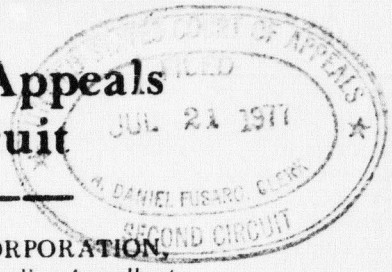
United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL 77-7216

United States Court of Appeals
For the Second Circuit



ASSOCIATED METALS AND MINERALS CORPORATION,
Plaintiff-Appellee-Appellant,

-against-

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant-Appellee,

and

APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,
Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Docket Entries 1

Notice of Appeal 5

Declaratory Judgment 7

Memorandum and Order 9

Complaint 26

Exhibit to Complaint (Complaint in South Dakota) . 33

Answer of Appalachian 47

Answer of Hartford 51

Decision of Judge in South Dakota 60

Deposition of Drinkard 69

DOCKET ENTRIES

8-25-76. Filed Complaint. Issued Summons.

9-9-76. Filed summons & marshal's return.

9-21-76. Filed Stip & Order extending Deft's. (Hartford) time to answer to 10-4-76. ... Haight, J.

10-1-76. Filed Dft. Hartford Accident's affidavit and motion pursuant to Rule 12b and Rule 19 FRCP.

10-7-76. Filed ANSWER of deft Appalachian (A&M).

11-5-76. Filed affidavit in opposition to defts. motion.

11-5-76. Filed pltffs memo of points and authorities in opposition to motion.

11-12-76. PTC held Haight.

11-18-76. Filed Deft. Hartford Accident & Indemnity Co. Reply Affidavit with Memorandum of Law.

11-19-76. PTC held Haight, J.

12-6-76. Filed memo and order. Hartfords motion to dismiss or stay the instant action is denied. So ordered. Haight, J. m/n

12-10-76. PTC held Haight, J.

12-13-76. Filed notice of motion and affidavit for a stay of proceedings ret. 12-24-76 at 9:30 AM.

12-13-76. Filed defts notice of appeal to the USCA from the order of 12-3-76 etn. 12-6-76 by J. Haight.

12-13-76. Filed ANSWER.

12-15-76. Filed Deft. Hartford Accident & Indemnity Company's Affidavit and Notice of Motion for an order quashing subpoena duces tecum issued, etc. RET: 12-17-76.

12-15-76. Filed Deft. Hartford Accident & Indemnity Company's Rule 34 Notice for document discovery.

2-15-76. Filed Third Party Complaint. Demand trial by jury (BN&M).

12-16-76. Filed affidavit in opposition by H. Berel.

12-16-76. Filed reply affidavit of S. Bate.

12-16-76. Filed defts interrogs.

12-16-76. Filed response to notice to admit.

12-16-76. Filed interrogs of deft Hartford Accident.

12-16-76. Pre Trial conference held and concluded... Decision on plaintiff's motion to strike third party complaint is reserved. Defendant Hartford is to respond to pltff's request to admit within ten days. All discovery to be completed within 45 days. All pending written interrogs. are stricken. Discovery shall consist of: (1) production of documents, (2) deposition of witnesses and (3) written interrogs. Discovery will be supervised by a Magistrate to be designated by the Court. Defts motion for a stay, insofar as it relates to the proposed third party complaint, is reserved. Defts motion for a stay, based upon its notice of appeal previously filed, is denied in the Court's discretion, the Court being of the view that in the circumstances of this case, trial should be expedited.

12-21-76. Filed memo and order ... third party complaint is stricken, and the motion for a stay is denied. So ordered Haight J. m/n.

12-27-76. Filed response to notice to admit.

1-6-77. Filed notice of deposition of Marsh & McLennan on 1-19-77.

1-6-77. Filed notice of deposition of Mineral Research & Development Corp. on 1-26-77.

1-6-77. Filed notice of deposition of Hartford Accident & Indemnity Co. on 1-21-77.

1-6-77. Filed notice of deposition of Lumbermens Mutual Insurance Co. on 1-24-77.

1-6-77. Filed notice of deposition of Appalachian Insurance Company of Providence on 1-13-77.

1-10-77. Filed Third party summons and return served the following: Insurance Co. of NA. on 1-3-77. Lumbermens' Mutual on 1-6-77.

4-7-77. PTC held Haight, J.

1-13-77. Filed stip and order (certified copy) withdrawing Appeal to USCA.

1-31-77. Filed transcript of proceedings dated 12-16-76.

1-21-77. PTC held Mag. Bernkon.

2-7-77. PTC held Mag. Bernkon.

2-17-77. Filed notice of deposition of F. Smith on 2-28-77.

2-9-77. PTC held Mag. Bernkon.

3-4-77. Non jury trial begun and cont.

3-8-77. Trial cont. Decision reserved on all motions.

3-11-77. Filed memo and order. Counsel for deft requested to see a sealed letter addressed to M. Milano ... I hold that this letter need not be disclosed to coun el for deft. The letter has been marked Court Ex. 1 and will be returned to pltff counsel. So ordered. Haight—M/N.

3-24-77. Filed opinion #45727.... Hartford is entitled to judgment declaring it is under no liability to Associated.... Associated is entitled to judgment declaring.... Appalachian liable to defend and indemnify Associated in respect to Grismer suit... Associated is entitled to judgment from Applachian in amt of $40,512.64 with int. form day of judgment... Hartford is entitled to recover costs, in amt. to be taxed by Clerk... Counsel for Associated directed to settle judgment within 10 days of opinion... So ordered. Haight J. m/n

4-1-77. Filed judgment #77,461.... order and adjudged that deft Appalachian is liable to defend pltff in Grismer suit... Applachian is liable to indemnify Associated from all claims up to $10,000.00 etc. Associated recover from Applachian the sum of $40,612.64 with interest from date of judgment. deft. Hartford is not liable to defend Associated... deft Hartford shall cover costs to equally apportioned between Associated and Applachian to be fixed by Clerk of the Court. Judgment ent.—Clerk on 4-4-77 (on docket 4-5-77) m/n

4-18-77. Filed Bill of Costs for judgment #77,461 ... taxed in the sum $2,200.77 in favor of the deft. Hartford Accident & Indemnity Co. as against Associated Metals &

Mineral Corp. and Applachian and added to Judgment (Clerk 4-18-77 m/n (on docket 4-19-77).

5-4-77. Filed Pltffs. Notice of Appeal from judgment entered 4-4-77. (mailed notice).

5-4-77. Filed Dfts. Notice of Appeal from Judgment entered 4-1-77. (mailed notice).

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED METALS & MINERALS CORPORATION,

Plaintiff,

-against-

HARTFORD ACCIDENT & INDEMNITY COMPANY and APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendants.

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76 Civ. 3807 (CSH)

S I R S:

PLEASE TAKE NOTICE that defendant, APPALACHIAN INSURANCE COMPANY OF PROVIDENCE, does hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment made herein on April 1, 1977 and entered on April 4, 1977 and the said defendant appeals from each and every part of the said Judgment, as well as from the whole thereof, on the law and the facts.

Dated: New York, New York
April 28, 1977.

Yours, etc.,

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By s/ Alan Jay Martin
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A Member of the Firm

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Clerk of the Court
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

DECLARATORY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED METALS & MINERALS CORPORATION,

Plaintiff.

-against-

HARTFORD ACCIDENT & INDEMNITY COMPANY and APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendants.

---

76 Civ. 3807 (CSH)

This action came on for trial before the Court, Honorable CHARLES S. HAIGHT, JR., District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered; it is

ORDERED, ADJUDGED AND DECREED that this Court has jurisdiction of this action pursuant to 28 USC §§1332 and 2201; and it is further

ORDERED, ADJUDGED AND DECREED that defendant APPALACHIAN INSURANCE COMPANY OF PROVIDENCE ("Appalachian") is and was at all times relevant liable to defend plaintiff ASSOCIATED METALS & MINERALS CORPORATION ("Associated") in the action commenced by Grismer Farms, Inc. ("Grismer") against Associated in the United States District Court for the District of South Dakota (Northern Division) bearing Docket No. Civ. 76-1006 ("the South Dakota action") and to defend Associated from all claims made against Associated by Domain Industries, Inc., d/b/a Doboy Feeds, Grain Terminal Ass'n., King Castle, Inc., Bonewitz Laboratories & Supply Company, Gladwin A. Read and

Ray Van Pouche, a partnership, d/b/a Gladwin A. Read Co., Basic, Inc., Mineral Research & Development Corp. and Talbot-Carlson, Inc. ("the other defendants in South Dakota") in the South Dakota action; and it is further

ORDERED, ADJUDGED AND DECREED that Appalachian is liable to indemnify Associated from all claims up to $10,000,000 in the South Dakota action, including those of Grismer and the other defendants in South Dakota, subject, however, to a retained limit of the first $25,000 which shall be borne by Associated; and it is further

ORDERED, ADJUDGED AND DECREED that Associated recover from Appalachian the sum of $40,612.64 together with interest at the rate of 6% per annum from the date of this judgment; and it is further

ORDERED, ADJUDGED AND DECREED that defendant HARTFORD ACCIDENT & INDEMNITY COMPANY ("Hartford") is not liable to defend Associated in the South Dakota Action against or indemnify Associated from any of the claims therein made against Associated by Grismer or the other defendants in South Dakota) and it is further

ORDERED, ADJUDGED AND DECREED that HARTFORD ACCIDENT & INDEMNITY COMPANY ("Hartford") shall recover its costs in this action which are to be apportioned equally against Associated and Appalachian and fixed by the Clerk of the Court.

Dated: New York, New York
March 31, 1977
s/ Charles S. Haight, Jr.
U.S.D.J.

JUDGMENT ENTERED 4/4/77
s/ Raymond J. Burglandt
Clerk

MEMORANDUM AND ORDER

(Same Title)

Appearances:

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By: Barry D. Lesser, Esq.

HAIGHT, District Judge:

Plaintiff Associated Metals & Minerals Corporation ("Associated") instituted suit pursuant to 28 U.S.C. §2201 for a declaration of its rights under policies of insurance issued by defendant Hartford Accident & Indemnity Company ("Hartford") and Appalachian Insurance Company of Providence ("Appalachian"). Jurisdiction is predicated upon diversity of citizenship. By stipulation of the parties, the case was tried to the Court without a jury.

I.

Associated is a New York corporation. One of its divisions is called Gulf Chemical & Metallurgical Company ("Gulf"). In the course of conducting its business and to protect itself against legal liability while so engaged, Associated obtained from defendant Hartford, a stock insurance company incorporated under the laws of, and having its principal place of business in, the State of Connecticut, two casualty insurance policies, bearing the Policy Nos. 10 C 653293E and 10 C 646637E (collectively called "the Hartford policy"). That policy provided comprehensive general liability coverage for all property damage liabilities of up to $100,000 incurred by plaintiff, its subsidiaries and divisions, and required Hartford to defend plaintiff, at Hartford's expense, in any action or proceeding commenced against plaintiff for such damages. The Hartford policy was in full force and effect during 1974 and 1975.

As additional protection against liability actions, Associated obtained from defendant Appalachian, a stock insurance company incorporated under the laws of, and having its principal place of business in, the State of Rhode Island, a Special Risk Policy bearing Policy No. 71097 ("the Appalachian policy"). That policy provided, in substance, that Appalachian would pay, on behalf of plaintiff, all sums in excess of a retained limit of $25,000 up to $10,000,000 which were not otherwise covered by insurance policies, including the Hartford policy, which plaintiff might become legally obligated to pay as damages because of, among other things, property damage sustained by any person as a result of plaintiff's operations; and to defend plaintiff, at Appalachian's expense, in any action or proceeding against plaintiff for such damages. The Appalachian policy was in full force and effect during 1974 and the first four months of 1975.

The only named assured in the Hartford policy was "Associated Metals & Minerals Corp." The Hartford policy contained the following exclusion from coverage:

> "This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in this policy as a named insured."

Under date of July 16, 1973, Gulf entered into a contract with Mineral Research & Development Corp. ("MRDC"), a North Carolina corporation. The contract recites the desire of the parties to enter into a "joint venture".[1] The contract refers to the fact that MRDC and Gulf are joint owners of some 12,000 tons of hydrated magnesium oxide, located in stockpiles on MRDC's premises at Freeport, Texas; that MRDC is the owner of an additional undetermined amount of that substance on the same premises; and that MRDC and Gulf desired to enter into a joint venture for the purpose of selling and processing the hydrated magnesium oxide.

In furtherance of this self-styled joint venture, Gulf and MRDC agreed that MRDC would convey a "contingent 50% interest" in the hydrated magnesium oxide which it owned outright to Gulf, such conveyance being "for the purpose of this joint venture only" (Art. I). In essence, the joint venture agreement placed upon Gulf the responsibility of processing the hydrated magnesium oxide at Freeport (Art. II); and placed upon MRDC the responsibility for negotiating and arranging sales of the processed material (Art. V). Following negotiation of a sale, MRDC furnished Gulf with copies of sales invoices (Art. V); Gulf was responsible for shipping the material to the purchaser (Art. VIII). MRDC was to supply warehouse space for the processed material, billing the joint venture for such expense (Art. IX). Profits were to be distributed on

a 50-50 basis, with receipts of sales being deposited in a joint bank account requiri[illegible]g the signature of both a Gulf and MRDC representative (Art. VI, VII).

The evidence reveals[2] that the objective of the joint venture was to process hydrated magnesium oxide, a stable compound consisting of 30% moisture and 70% magnesium oxide by heating, so that the water is eliminated, and what remains is a standard commercial grade of magnesium oxide.[3] Magnesium oxide is used, among other purposes, as an ingredient for livestock feed.[4]

On March 12, 1976, an action was commenced in the United States District Court for the District of South Dakota, Northern Division (Docket No. Civ. 76-1006) by Grismer Farms, Inc. The complaint names eight corporate or partnership defendants, including MRDC and Associated, who are described in the Grismer complaint (paragraph X) as "a business venture". In that action, Grismer seeks damages in the sum of $3,500,000 plus interest and costs, alleging that its herd of cattle sickened, died, or had to be destroyed as the result of ingesting adulterated cattle feed. The complaint alleges, in particular, that the feed was contaminated by molybdenum, a substance which, it would appear, produces disastrous results when ingested by cattle. Grismer brought suit against all the entities it could identify in the commercial chain which manufactured, sold, re-sold, and distributed the several ingredients which went into the feed which poisoned its cattle. Associated and MRDC (of which Gulf is a division) are included as defendants in the Grismer complaint, on the theory that the offending feed contained magnesium oxide, that the magnesium oxide in question was originally obtained from the Gulf/MRDC joint venture; and that the presence of molybdenum, the contaminating agent, may be ascribed to the joint venture's hydrated magnesium oxide.[5]

When Associated was served with the Grismer complaint, it advised Hartford, which initially undertook the defense of the action, retaining for that purpose Francis M. Smith, Esq., of the firm of Woods, Fuller, Schultz and Smith, of Sioux Falls, South Dakota, to conduct the defense for Associated. Subsequently, however, Hartford learned of the joint venture between Gulf, Associated's affiliate, and MRDC. Hartford thereupon disclaimed coverage, relying upon the exclusion quoted *supra*. Since the time of that disclaimer, Associated has been required to conduct and pay for its own defense. The services rendered by Mr. Smith and his firm have been paid for by Associated. In addition, Associated's counsel in New York, the firm of Paskus, Gordon & Hyman, have concerned themselves in Associated's defense against the Grismer action to a degree that would not have obtained had Hartford continued its defense of the action.

Appalachian, the other defendant with whom Associated had a policy, has declined to undertake the defense of Associated in the Grismer suit, on the theory that Hartford is not entitled to disclaim coverage, so that the responsibility of defending the suit, and paying the first $100,000 of any liability assessed against Associated, falls upon Hartford. That is the position which Appalachian put forward in the trial before me.

In these circumstances, in which Associated had paid premiums to two liability insurance companies and was being defended by neither, Associated commenced the present action for judicial declaration of its rights.

II.

Hartford's position is simplicity itself. Under its policy, the insurance does not apply to property damage:

> ". . . arising out of the conduct of any . . . joint venture of which the insured is a . . . member and

which is not designated in this policy as a named insured."

Grismer's theory is that the contaminating agent was contained in the magnesium oxide processed and sold by the Gulf/MRDC joint venture; accordingly the alleged property damage must be viewed as "arising out of the conduct" of that joint venture; and, since the joint venture was not designated in the policy as a named insured, there is no coverage.

The argument has a powerful initial appeal. But Associated, energetically supported by Appalachian, contends that the exclusionary provision in the Hartford policy does not apply to Associated's potential liability arising out of the Grismer suit.

First, Associated argues that the effect of the exclusion is limited to vicarious liability which might be visited upon Associated solely as the result of the negligence of a joint venturer, wholly uncomplicated by any negligence on the part of Associated itself.

Authority for this proposition is said to be found in *Shehee v. Aetna Casualty & Surety Co.*, 122 F.Supp. 1 (W.D.La. 1954). In *Shehee*, two physicians who were members of a medical partnership known as the Green Clinic were sued for malpractice. The liability underwriter was also sued, alone and directly under the Louisiana Direct Action Statute. The insurance company defended *inter alia*, on the basis of the following exclusionary provision in the policy:

"This agreement does not apply ***

"(d) To the liability of the Assured as a member of a partnership or as proprietor, superintendent or executive officer of any hospital, sanitarium, dispensary or clinic."

The district court, rejecting that defense, held that this particular clause applied only to "liability as *respondeat*

superior or *as a partner* for th malpractice *of another partner*, not the individual liability of a partner for malpractice committed by himself", 122 F.Supp. at p. 7 (emphasis is the court's). Concluding on this point, the court stated:

> "Which is to say, this exclusion of coverage is patently inapplicable here because liability under this policy attaches to defendant, not from the relationship of Drs. Harms and Marvin Green as partners—each responsible *pro tanto* for the wrongful acts of the other—but from the individual, personal liability of each for his own torts." 122 F.Supp. at p. 7.

Analogizing the exclusionary clause in *Shehee* to the clause in the case at bar, Associated argues that the only liability excluded under the Hartford policy is a liability falling upon Associated by means of *respondeat superior* or some other species of vicarious liability, arising out of the negligence of MRDC, its joint venturer, and uncontaminated in any way by negligence of Associated. Associated reads the Grismer complaint as alleging the individual and direct wrongdoing of Associated, and further contends that, upon the trial of the Grismer suit, liability could be assessed against Associated on that basis. In consequence, the argument runs, the exclusionary clause is not applicable.

Associated butresses its argument with reference to the rule, well established in New York insurance cases,[6] that a liability insurer's duty to defend may be broader than the duty to pay. Thus it is generally held that where a third party's complaint against the insured contains allegations which, on their face, would give rise to a covered liability, the insurer is obligated to defend, "regardless of whether such allegations squared with objective truth or were utterly false and groundless."

Goldberg v. Lumber Mutual Cas. Ins. Co., 297 N.Y. 148, 153 (1948). In addition to *Goldberg*, the seminal case in point, Associated also relies on *Doyle v. Allstate Ins. Co.*, 1 N.Y.2d 439 (1956) and *Sucrest Corp. v. Fisher Governor Co.*, 83 M.2d 394, 371 N.Y.S.2d 927 (Sup.Ct. N.Y. 1975).

I am not persuaded by these arguments, either separately or in combination. As to the *Shehee* case, I perceive a difference between the exclusionary clause there presented and the clause in the case at bar. In *Shehee*, coverage was excluded in respect of the "*liability* of the assured as a member of a partnership . . ." Having expressly excluded one basis of liability, other bases (such as individual, personal liability) remain. This construction illustrates the familiar maxim *expressio unius est exclusio alterius*. But the Hartford policy excludes coverage for property damage "arising out of the conduct of any . . . joint venture" of which Associated is a member. The emphasis is upon conduct and causation, rather than liability. These concepts are broader. Conduct may constitute a cause in fact of an injury, without liability attaching.[7] What Hartford sought to exclude from its policy was damage "arising out of" (thus "caused by") the "conduct" of a joint venture in which Associated had participated without having designated the joint venture as a named assured. Grismer contends that a substance processed and sold by the Gulf/MRDC joint venture found its way into the feed and poisoned the cattle. Obviously this is a claim for property damage "arising out of the conduct" of the joint venture.[8] If the Grismer claim does not fall within the exclusionary clause, it is difficult to imagine a state of facts that would.

It is of no significance that Gulf and MRDC performed different functions in the joint venture, so that *liability*, if any, to Grismer may arise out of what Gulf did (processing) rather than what MRDC did (selling).[9] It is the conduct of the joint venture and its consequences that

the policy excludes, without regard to the respective contributions of the members. If Hartford intended to limit the exclusion to vicarious liability as a joint venturer, appropriate language was at hand. The clause as written cannot be given so narrow a construction without doing violence to its plain language.

The only case counsel have cited, or the Court has discovered, involving precisely the same exclusionary clause is *Maryland Casualty Co. v. Turner*, 403 F.Supp. 907 (W.D.Okla. 1975). The clause was held inapplicable to the facts in that particular case; during the course of its opinion the district court characterized the clause as "ambiguous" and "not clear", a characterization upon which Associated relies, but with which I respectfully cannot agree. What is more instructive about the *Maryland Casualty Co.* case is the manner in which the facts differ from the facts of the instant case. In *Maryland Casualty Co.*, an individual was injured by a vehicle on the premises of a drive-in theater. The insurance company had insured the drive-in theater and its owners against such liability; the policy contained the same exclusionary clause referring to bodily injury "arising out of the conduct of any . . . joint venture." The insurance company sought a declaration of non-coverage on the basis of that clause. The insurer's argument was based upon an arrangement between the drive-in theater and a local radio station, pursuant to which the station and the theater agreed to divide the proceeds of a special "fun night" at the theater in return for the station's advertising the event and cancelling the theater's prior indebtedness to the station. The district court, rejecting the insurer's contention based upon the exclusionary clause, found as facts that there was no joint venture between the theater and the station; that the independent functions and services performed by the station constituted nothing more than its normal advertising business, with compensation for such services taking the

form of a portion of the gate receipts, "which does not constitute a joint venture" (403 F.Supp. at p. 911); that "there was no intent by either party to form a joint venture" (*ibid.*); that the station and theater were "separate and independent and neither had any authority or control over the other" (*ibid.*); and that under the agreement each party would assume and pay its own losses, "each being an independent contractor" (*ibid.*). The court concluded on this factual issue:

> "The claimed joint venture between Ronald Turner and James J. O'Donnell, d/b/a Woodstock Drive-in Theatre and KWHP Radio Station is without proper foundation inasmuch as there was no intention on the part of the parties, either or both of them, to form a joint venture, and the evidence is clear that KWHP had no seizure rights in and to the Woodstock Drive-in Theatre." 403 F.Supp. at p. 912.

In the case at bar, the arrangement between Gulf and MRDC is entirely different, and constitutes a genuine joint venture. By clear negative implication, the district court in *Maryland Casualty Co.* would have applied the exclusionary clause had the facts in that case been as they are in the instant case.

Associated is not aided by the rule enunciated in *Goldberg v. Lumber Mutual Cas. Ins. Co., supra,* and its progeny, referred to above. None of these cases involves the construction of an exclusionary clause. Instead, they consider whether a third party's complaint alleges facts which fall within the provisions in the policy which define what the coverage is, rather than what it is not. Thus in *Goldberg,* the Court of Appeals observed:

> "The complaint in the negligence action contained the precise allegations necessary under the policy, to compel the insurer to defend; it asserted that the

> accident occurred on protected premises during the time when specifically covered operations of the insured were still in progress. The tenant had sought to hold the insured liable to her upon the theory that he was still at work on the job when she was injured—*precisely the sort of liability covered by the policy.* Whether or not the insurance company would have been under a duty to pay had the tenant prevailed in the negligence suit need not now concern us (see Bloom-Rosenblum-Kline Co. v. Union Indemnity Co., 121 Ohio St. 220, 222), for its is crystal clear that—irrespective of this duty—the company had obligated itself to defend if a suit were brought against its insured 'alleging such injury and seeking damages on account thereof.' " 297 N.Y. at p. 153. (emphasis added).

I have, of course, no quarrel with the general proposition that the allegations of a third party's complaint govern the insurer's duty to defend, so that such duty arises if the allegations state a claim within the provisions for coverage, even though the claim may lack merit so that no subsequent duty to pay will arise. However, the rule does not assist Associated in the circumstances of the present case. In the first place, as noted *supra*, Grismer's complaint characterizes Associated and MRDC as constituting a "business venture", which immediately raises the red flag of inquiry within the context of the Hartford exclusionary clause. For the reasons stated above, I conclude that the conduct on the part of Associated (and its affiliate Gulf) of which Grismer complains falls within that exclusionary clause.

While I recognize the rule that ambiguous language in a policy is to be construed against the insurer, the rule has no office to perform where, as here, the language is unambiguous and clearly applicable to the circumstances presented by the case.

III.

As an alternative theory against Hartford, Associated relies upon the "vendor's endorsement" in the policy, which provides:

> "It is agreed that the 'Persons Insured' provision is amended to include any person or organization (herein referred to as 'Vendor'), as an Insured, but only with respect to the distribution or sale in the regular course of the Vendor's business of the Named Insured's products . . ."

Associated contends that, even if the joint venture exclusion applies, the effect of this endorsement is to include the Associated/MRDC joint venture as an insured under the policy.

I cannot accept this contention. To afford coverage under this endorsement, the joint venture would have to be regarded as a vendor engaged, in the regular course of its business, with the "distribution or sale . . . of the Named Insured's [that is, Associated] products." The difficulty for Associated is that the processed product in question is the product of the joint venture, and not that of Associated as named insured. The "vendor's endorsement" clearly contemplates two separate entities, namely the insured and its vendor, with the vendor undertaking the distribution or sale of the insured's product "in the regular course of the vendor's business". It requires no discussion to demonstrate that such an arrangement bears no resemblance to the facts of the case at bar.

IV.

The Court concludes, therefore, that Hartford is under no liability on its policy. This leaves for consideration the position of Appalachian. Again, no extensive

discussion is necessary. As noted *supra*, Appalachian's obligation is to defend any such claims against Associated not covered by the Hartford policy, and to pay any liability falling upon Associated, subject to the retained limit of $25,000 (which Associated must bear) and the policy limitation of $10,000,000. Appalachian suggests no reason why its policy should not cover Associated if, as I have concluded, the Hartford policy does not.[10]

In these circumstances, the obligation to defend and indemnify Associated in respect of the Grismer suit falls upon Appalachian.

V.

Appalachian having failed to defend Associated in the Grismer suit, Associated is entitled to recover from Appalachian the legal expenses which it has incurred in defending the action itself.[11]

I find, on the evidence adduced at trial, that Associated has incurred the following legal expenses in connection with the Grismer litigation.

(1) Paid to counsel in South Dakota (including the invoice of February 25, 1977): $19,424.40.

(2) Fee of the Paskus firm for time devoted to the case: $19,343.00.

(3) Cash disbursements of the Paskus firm: $1845.24.

Total: $40,612.64

I further find that the services and disbursements comprising these items were necessarily incurred in the defense of the action, and that they are reasonable in amount. Accordingly Appalachian is liable to Associated in the amount indicated.

VI.
CONCLUSION

In the light of the foregoing, the Court concludes as follows:

1. Hartford is entitled to judgment declaring that it is under no liability to Associated in respect of the policies in suit.

2. Associated is entitled to judgment declaring Appalachian liable to defend and indemnify Associated in respect of the Grismer suit, subject to the limitations in the Appalachian policy.

3. Associated is entitled to judgment from Appalachian in the amount of $40,612.64, together with interest from the date of judgment.

4. Hartford is entitled to recover its costs, in an amount to be taxed by the Clerk, the costs thereafter to be apportioned equally between Associated and Appalachian.

Counsel for Associated are directed to settle a judgment in conformity with this opinion, on notice, and within ten (10) days of the date of this opinion.

It is So Ordered.

Dated: New York, New York
March 21, 1977

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U.S.D.J.

Footnotes

1. Thus the final "whereas" paragraph recites:

"WHEREAS, the parties hereto desire to enter into a joint venture for the mutual benefit of both parties, said venture being for the purpose of selling and for processing said hydrated magnesium oxide."

2. The primary source of evidence on the functioning of the joint venture is the deposition of William Drinkard, MRDC president (defendant Hartford's Exhibit A).

3. Drinkard deposition, p. 3.

4. The particular functions of Gulf and MRDC were described in the Drinkard deposition, pp. 42-3, 45:

"Q. Now, the processing of the hydrated magnesium oxide in Freeport, by whom was that conducted, sir?

"A. By Gulf.

"Q. And the processing consisted of drying, screening and something else, sir?

"A. The entire operation. They would dig it up, transport it, put it into whatever mechanical things they needed to do and then put it into the calcining equipment and then screen it and work with it after that and then analyze it before and after; and then put it into rail cars. The only thing that we did was to send them information as to which people were purchasing."

***

"Q. Will you tell us how the sales facilities were utilized of Mineral?

"A. Well, we had sales people who made calls on accounts that were potentially interested in buying a commercial grade of magnesium oxide. When these people were interested, then we informed

Gulf of such, and Gulf sent them samples. These people looked at the samples and decided that they liked the product or they didn't. Then, they would place orders, and we would relay the orders to Gulf.

"Q. What purpose, generally, is the commercial grade of magnesium oxide used commercially [sic]?

"A. It's used for a wide variety of uses. There's no one specific use. It's used in chemical applications, to manufacture magnesium chemicals; and agriculture, it's used by both fertilizer and feed people. You never really have any clear idea exactly where it goes because all of the companies that are involved in the agricultural purchase and resale of magnesium oxide are generally selling to both fertilizer and feed applications."

5. That preciase theory of causation is not pleaded with such specificity in the Grismer complaint, but all three parties in the instant suit frame their arguments on the understanding that this is, in fact, Grismer's theory. Of course, liability to Grismer is in no way conceded by any of the parties in the litigation before me.

6. The policies in suit were issued in New York. The parties agree that New York law is applicable.

7. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928); *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961), *cert. den.*, 369 U.S. 804.

8. Associated is in no position to deny that Gulf's *liaison* with MRDC *is* a joint venture, having used that very phrase to describe the arrangement in the contract. The phrase accurately characterizes the arrangement.

9. This distinction would not apply in other circumstances, as, for example, if the contaminating ingredient was present in the jointly-owned material prior to processing.

10. Indeed, Appalachian's responsible officer acknowledged that the Appalachian policy did not contain a joint venture exclusion (McCabe deposition, p. 14); that Gulf was a covered subsidiary of Associated (p. 28); and that Appalachian was obligated to defend and indemnify Associated in respect of the Grismer claim, to the extent that Hartford or any other insurer was not responsible (pp. 34-5, 37).

11. *Goldberg v. Lumber Mutual Cas. Ins. Co., supra.*

COMPLAINT AND EXHIBITS

(Same Title)

Plaintiff ASSOCIATED METALS & MINERALS CORPORATION for its complaint against the defendants HARTFORD ACCIDENT & INDEMNITY COMPANY and APPALACHIAN INSURANCE COMPANY OF PROVIDENCE, by its attorneys, Paskus, Gordon & Hyman alleges upon information and belief:

AS A FIRST CLAIM FOR RELIEF

1. Plaintiff is a corporation incorporated under the laws of the State of New York and has its principal place of business in the State of New York. Defendant HARTFORD ACCIDENT & INDEMNITY COMPANY ("Hartford") is a stock insurance company incorporated under the laws of and has its principal place of business in the State of Connecticut. Defendant APPALACHIAN INSURANCE COMPANY OF PROVIDENCE ("Appalachian") is a stock insurance company incorporated under the laws of and has its principal place of business in the State of Rhode Island. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

2. This is an action for a declaratory judgment pursuant to 28 U.S.C. §2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

3. Hartford at all times relevant was an insurance carrier licensed and authorized to engage in the business of casualty insurance.

4. Appalachian at all times relevant was an insurance carrier licensed and authorized to engage in the business of casualty insurance.

5. Heretofore there was in effect insurance policies

each known as a Casualty Insurance Policy bearing Policy Nos. 10 C 653293E and 10 C 646637E which Hartford issued to plaintiff, which provided comprehensive general liability coverage on all of the operations of Associated (collectively called "the Hartford policy").

6. Heretofore there was in effect an insurance policy known as Special Risk Policy bearing Policy No. 71097 which Appalachian issued to plaintiff which provided coverage for all excess liability on all of the operations of Associated ("the Appalachian policy").

7. The Hartford policy was in full force and effect during 1974 and 1975.

8. The Appalachian policy was in full force and effect during 1974 and the first four months of 1975.

9. The Hartford policy provided in substance that it pay on behalf of the plaintiff all sums up to $100,000 which plaintiff shall become legally obligated to pay as damages because of, among other things, property damage sustained by any person by reason of the operations of plaintiff and to defend plaintiff at Hartford's expense any action or proceeding commenced against plaintiff in connection with claim for such damages.

10. The Appalachian policy provided in substance that it pay on behalf of the plaintiff all sums in excess of a retained limit of $25,000 up to $10,000,000 and which were not otherwise covered by insurance policies including the Hartford policy, which plaintiff shall become legally obligated to pay as damages because of, among other things, property damage sustained by any person by reason of the operations of plaintiff and to defend plaintiff at Appalachian's expense any action or proceeding commenced against plaintiff for such damages.

11. On or about March 12, 1976 an action was commenced in the United States District Court for the District of South Dakota by Grismer Farms, Inc. ("Grismer") against plaintiff as well as Domain Industries,

Inc. d/b/a Doboy Feeds, Grain Terminal Ass'n., King Castle Inc., Bonewitz Laboratories & Supply Company, Gladwin A. Read and Ray VanPo che d/b/a Gladwin A. Read Co., Basic, Inc., Talbot-C lson, Inc. ("the other defendants in South Dakota") a d Mineral Research & Development Corp. ("MRDC"), in which action Grismer seeks damages from plaintiff, MRDC and the other defendants in South Dakota in the sum of $3,500,000 and interest, together with the costs and disbursements of that action.

12. A copy of said complaint of Grismer against plaintiff, MRDC and the other defendants in South Dakota filed in that action ("the South Dakota action") is annexed hereto as Exhibit A.

13. Thereafter, each of the other defendants in South Dakota asserted claims against plaintiff for indemnification in the event that it is or they are held liable to Grismer by reason of the matters described in the complaint in the South Dakota action.

14. Hartford was duly notified by plaintiff of these claims made against plaintiff and of the pendency thereof and Hartford has denied liability and disclaimed coverage to plaintiff for any judgments which may be rendered against it in the South Dakota action and refused to furnish a defense to plaintiff in said action.

15. Hartford claims that the Hartford policy does not apply to property damages arising out of the conduct of a joint venture of which the insured is a member and which is not designated in said policy as a named insured.

16. Hartford claims that the property damages claimed in the South Dakota action arose out of the conduct of a joint venture between plaintiff and MRDC which was not designated in the Hartford policy as a named insured.

17. Plaintiff claims, among other things, that it is covered by the Hartford policy against the claims arising

against it in the South Dakota action because (a) said action was commenced against plaintiff by Grismer and claims were made against plaintiff by the other defendants in South Dakota and not against an alleged joint venture; (b) the alleged acts of plaintiff which were the subject of claims against plaintiff by Grismer and the other defendants in South Dakota were those of plaintiff, not of an alleged joint venture; and (c) Hartford had expressly agreed that the "persons insured" for comprehensive general liability by the Hartford policy included all persons or organizations distributing or selling plaintiff's products in the regular course of that person's or organization's business.

18. Appalachian was duly notified by plaintiff of the claims made against plaintiff in the South Dakota action and of the pendency thereof.

19. Appalachian acknowledges that the Appalachian policy insures plaintiff against all claims made against plaintiff in the South Dakota action by Grismer and the other defendants in South Dakota to the extent that those claims are not otherwise covered by other insurance policies including the Hartford policy and are in excess of the retained limit of $25,000 up to $10,000,000.

20. Appalachian claims that plaintiff is covered by the Hartford policy against the claims made against plaintiff in the South Dakota action to the extent of the amount of the Hartford policy and that Hartford is bound thereby to furnish a defense on behalf of plaintiff to the claims of Grismer and the other defendants in South Dakota.

21. Appalachian has not furnished to plaintiff a defense to the claims of Grismer and the other defendants in South Dakota arising in the South Dakota action.

22. There is an actual controversy existing between plaintiff, Hartford and Appalachian as to the obligations of Hartford and Appalachian to plaintiff under the Hartford policy and the Appalachian policy.

23. Plaintiff requires and requests a declaration of its rights and obligations and those of Hartford and Appalachian by this Court in accordance with the applicable provisions of law relating to declaratory judgments.

24. Hartford and Appalachian are named as defendants for the purpose of having before this Court all those who will or may be affected by the judgment entered herein.

25. Plaintiff has no adequate remedy at law.

AS A SECOND ALTERNATIVE CLAIM FOR RELIEF

26. Repeats and realleges the allegations contained in paragraphs 1 through 25 of this complaint.

27. The amount of premiums to be paid by plaintiff to Hartford for the Hartford policy were calculated by Hartford on the basis of activities and payrolls of plaintiff, including the activities out of which the claims against plaintiff by Grismer and the other South Dakota defendants arose.

28. Hartford was informed that at all times relevant plaintiff understood and believed that claims against plaintiff such as those which are being made by Grismer and the other defendants in South Dakota were covered by the Hartford policy.

29. Hartford prior to the making of the claims by Grismer and the other defendants in South Dakota against plaintiff never informed or disclosed to plaintiff that such claims were excluded from coverage under the Hartford policy.

30. By reason of the foregoing, Hartford is barred from disclaiming coverage by the Hartford policy of the claims of Grismer and the claims of Grismer and other defendants in South Dakota and refusal to defend plaintiff in the South Dakota action.

AS A THIRD CLAIM FOR RELIEF

31. Repeats and realleges the allegations contained in paragraphs 1 through 25 and 27 through 30 of this complaint.

32. By reason of the foregoing disclaimer by Hartford and its refusal to defend plaintiff in the South Dakota action, Hartford is liable to plaintiff in the sum of $16,000 for attorneys' fees and expenses already necessarily incurred on behalf of plaintiff in the South Dakota action.

AS A FOURTH AND ALTERNATIVE CLAIM FOR RELIEF

33. Repeats and realleges the allegations contained in paragraphs 1 through 25 and 27 through 30 of this complaint.

34. By reason of the foregoing, Appalachian is liable to plaintiff in the sum of $16,000 for attorneys' fees and expenses already necessarily incurred on behalf of plaintiff in the South Dakota action.

AS A FIFTH CLAIM FOR RELIEF

35. Repeats and realleges the allegations contained in paragraphs 1 through 25, 27 through 30 and 31 through 32 of this complaint.

36. By reason of the foregoing, Hartford is liable to plaintiff for its attorneys' fees in bringing this action.

WHEREFORE, plaintiff demands judgment herein adjudging and declaring that:

(a) The disclaimer of coverage by Hartford in connection with the Hartford policy was improper and wrong;

(b) That Hartford is required to defend and indemnify plaintiff against the claims of Grismer

and the other defendants in South Dakota;

(c) To the extent that the claims of Grismer and the other defendants in South Dakota against plaintiff exceed the amount of coverage of plaintiff under the Hartford policy, Appalachian is required to defend and indemnify plaintiff against the claims of Grismer and the other defendants in South Dakota;

(d) That Hartford is liable to plaintiff in the sum of $16,000 and for all other attorneys' fees, costs and expenses thereafter necessarily incurred in defense of plaintiff against the claims of Grismer and the other defendants in South Dakota, and to the extent that Hartford is not liable therefor, Appalachian is liable to plaintiff;

(e) That Hartford is liable to plaintiff for its attorneys' fees and bringing this action, and that plaintiff has judgment therefor; and

(f) Plaintiff have such other and further judgment as this Court considers just and equitable, together with the costs and disbursements of this action.

Dated: New York, New York
August 24, 1976

PASKUS, GORDON & HYMAN
By s/ P. H. Schaefs
A Member of the Firm
Attorneys for Plaintiff
Office and P.O. Address
733 Third Avenue
New York, New York 10017
(212) 557-9300

EXHIBIT—SUMMONS AND COMPLAINT IN SOUTH DAKOTA

IN UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

GRISMER FARMS, INC.,

Plaintiff,

vs.

DOMAIN INDUSTRIES, INC., d/b/a DOBOY FEEDS; GRAIN TERMINAL ASS'N.; KING CASTLE, INC.; BONEWITZ LABORATORIES & SUPPLY COMPANY; GLADWIN A. READ and RAY VAN POUCHE, a partnership, d/b/a GLADWIN A. READ CO.; BASIC, INC.; MINERAL RESEARCH & DEVELOPMENT CORP.; ASSOCIATED METALS AND MINERALS CO.; and TALBOT-CARLSON, INC.,

Defendants.

CIV 76-1006

SUMMONS

TO THE ABOVE NAMED DEFENDANTS: DOMAIN INDUSTRIES, INC., d/b/a DOBOY FEEDS; GRAIN TERMINAL ASS'N.; KING CASTLE, INC.; BONEWITZ LABORATORIES & SUPPLY COMPANY; GLADWIN A. READ and RAY VAN POUCHE, a partnership, d/b/a GLADWIN A. READ CO.; BASIC, INC.; MINERAL RESEARCH & DEVELOPMENT CORP.; ASSOCIATED METALS AND MINERALS CO.; and TALBOT-CARLSON, INC.:

You are hereby summoned and required to serve upon Thomas A. Kolker of the firm of Maloney, Kolker, Kelker & Fritz, Plaintiff's attorney, whose address is P.O. Box 487, Ipswich, South Dakota 57451, an Answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by Default will be taken against you for the relief demanded in the Complaint.

WILLIAM J. SRSTKA
Clerk of the United States
District Court for the District
of South Dakota

(SEAL OF COURT)

Dated: March 12, 1976

BY DEANN NOTEBOOM,
Deputy

COMPLAINT

(Same Title)

Plaintiff for it's causes of action against the above named Defendants alleges as follows:

I.

The jurisdiction of this Court is based upon diversity of citizenship between the parties and the matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars and no/100 ($10,000.00).

II.

That the Plaintiff invokes in personam jurisdiction over the Defendants herein involved by virtue of Chapter 15-7 of the South Dakota Compiled Laws of 1967 and the acts amendatory thereto.

III.

That the Plaintiff, Grismer Farms, Inc., is a South Dakota Corporation with it's principal place of business in Edmunds County, South Dakota.

IV.

That, upon information and belief, the Defendant Domain Industries, Inc., d/b/a Doboy Feeds, hereinafter referred to as Defendant Doboy, is a foreign corporation with it's principal place of business in the State of Wisconsin, dealing with products in interstate commerce.

V.

That, upon information and belief, the Defendant Grain Terminal Association, hereinafter referred to as Defendant GTA, is a foreign corporation with it's principal office in the State of Minnesota, dealing with products in interstate commerce.

VI.

That upon information and belief, Defendant King Castle, Inc., hereinafter referred to as Defendant King Castle, is a foreign corporation with it's principal place of business in the State of iowa, dealing with products in interstate commerce.

VII.

That upon information and belief, Plaintiff alleges that Defendant Bonewitz Laboratories & Supply Company, hereinafter referred to as Defendant Bonewitz, is a foreign corporation with it's principal place of business in the State of Iowa dealing with products in interstate commerce.

VIII.

That upon information and belief the Plaintiff alleges that the Defendant Gladwin A. Read Co. is a partnership consisting of Gladwin A. Read and Ray Van Pouche, hereinafter referred to as Defendant Read and Pouche, with it's principal place of business in the State of Illinois, and was at all times herein relevant, engaged in interstate commerce.

IX.

That upon information and belief, Defendant Basic, Inc., hereinafter referred to as Defendant Basic, is a foreign corporation with it's principal place of business in the State of Ohio, with a mining operation at Gabbs, Nevada, and was at all times herein involved engaged in interstate commerce.

X.

That upon information and belief, Defendant Mineral Research & Development Corp., hereinafter referred to as Defendant Mineral Research, is a foreign corporation with it's principal place of business in the State of North Carolina, and at all times herein relevant, was, among other things, engaged in a business venture with Defendant Associated Metals and Minerals Co., a foreign corporation hereinafter referred to as Defendant Associated Metals, with it's principal place of business in the State of New York, and at all times relevant hereto, both were engaged in interstate commerce.

XI.

Upon information and belief, the Defendant Talbot-Carlson, Inc., hereinafter referred to as Defendant Talbot-Carlson is a foreign corporation with it's principal place of business in the State of Iowa, and at all times relevant herein, was engaged in interstate commerce.

XII.

Prior to February 27, 1975, and for several months thereto, the Plaintiff purchased livestock feed from Defendant Doboy and trace mineral(s) from Defendant

Talbot-Carlson which were delivered to Plaintiff's farm for its livestock, consisting of its dairy cows, replacement heifers, calves, bulls, and feeder cattle, said feed was manufactured, distributed, processed, supplied, forwarded, marketed, prepared, mixed, promoted and or sold by Defendant Doboy, Defendant Talbot-Carlson, Defendant GTA, Defendant King Castle, Defendant Read & Pouche, and/or Defendant Supplier Bonewitz, and Defendant Manufacturer and Distributor Mineral Research and/or Defendant Associated Metals and/or Defendant Basic.

XIII.

That Plaintiff fed said feed and trace mineral(s) to its livestock and on or about February 27, 1975, Plaintiff's dairy cows, replacement heifers, calves, bulls, and feeder cattle became sick, lost weight, a portion of which died, causing damage to the Plaintiff as more fully set forth hereinafter, all of said damages being proximately caused by the adulterated and contaminated livestock feed and/or trace mineral(s) manufactured, distributed, processed, supplied, forwarded, marketed, prepared, mixed, promoted and/or sold by the Defendants.

XIV.

That at all times relevant hereto, the livestock feed and the trace mineral(s) herein involved contained molybdenum, which contaminated and adulterated the livestock feed and the trace mineral(s) herein involved, said substance, at no time, being an approved ingredient for livestock feed and contrary to the laws and or regulations of the United States and of the laws of the State of South Dakota.

XV.

At all times relevant hereto, Defendants, acting through it's duly authorized agents, servants, employees, distributors and workmen, all of whom were within the scope and course of their employment with Defendants, did in a negligent, careless, reckless and wrongful manner perform the acts and omissions set forth more fully herein.

COUNT ONE
STRICT LIABILITY

Plaintiff for it's first cause of action against the Defendants incorporates paragraphs I through XV and incorporates the same herein by reference as if fully set forth herein in writing.

XVI.

That the Defendants advertised, promoted, manufactured, processed, supplied, forwarded, marketed, prepared, mixed, and held for sale said livestock feed in an adulterated and contaminated condition, said livestock feed being unreasonably dangerous for its intended use and purpose.

XVII.

That the feed and trace mineral(s) purchased by the Plaintiff prior to the feeding of the same was in the original form in which it had been advertised, promoted, manufactured, processed, supplied, forwarded, marketed, prepared, processed, mixed and sold by the Defendants, and the Defendants well knew that the Plaintiff or any of it's ultimate consumers would not expect to test said feed before using the same.

XVIII.

At the time of feeding the livestock feed and the trace mineral(s) there has been no substantial change in the condition of the livestock feed or the trace mineral(s) or the ingredient(s) from the time that they were manufactured, processed, supplied, forwarded, marketed, prepared, mixed, supplied, processed, sold and delivered to the Plaintiff.

XIX.

That the Defendants failed to adequately advise the Plaintiff of said adulterated and contaminated condition of said livestock feed and/or trace mineral(s).

XX.

Defendants are strictly liable for advertising, promoting, processing, mixing preparing, supplying, forwarding, marketing, manufacturing and selling and causing contamined, adulterated and unreasonably dangerous livestock feed and/or trace mineral(s) to be placed into the stream of commerce damaging Plaintiff's livestock and as a direct result thereof Plaintiff was damaged.

XXI.

As a direct and proximate result of the actions of the Defendants, jointly and/or severally, Plaintiff was damaged in that Plaintiff's dairy cows and replacement heifers became sick, lost weight, a portion of which died, production of milk and dairy products greatly decreased and all livestock consumed excessive amounts of feed and were no longer of any value for the production of milk or

for breeding purposes, and in an effort to avoid further losses, Plaintiff disposed of the remaining livestock, that as a direct result of the actions of the Defendants as heretofore referred to, Plaintiff lost the calves of said livestock which were to be used as replacement heifers for dairy and breeding purposes and for market purposes; as a direct result thereof, Plaintiff's feeder cattle and bulls became sick, lost weight, a portion of which died, all to the detriment of the Plaintiff.

XXII.

As a direct result of the actions of the Defendants either jointly and/or severally, Plaintiff is entitled to recover lost profits, past and future, for loss of production of milk and related dairy products; for loss of profits sustained in the sale of livestock; for loss of offspring, present and future, as replacement heifers and cattle for market purposes; past and future income from dairy products; for veterinarian expenses; for the labor and costs of disinfecting barns, for additional labor extended for the care of the sick livestock; for death loss; costs and expenses of sale; loss of the benefits of twenty-one (21) years developing a quality dairy herd; for damages in the sum of One Million, Seven Hundred Fifty Thousand Dollars and no/100 ($1,750,000.00).

XXIII.

That said actions, whether jointly or severally, constitutes willful and wanton disregard to livestock and a complete disregard of the rights of the Plaintiff, entitling the Plaintiff to punitive damages in the sum of One Million, Seven Hundred Fifty Thousand Dollars and no/100 ($1,750,000.00).

COUNT TWO
IMPLIED WARRANTY

Plaintiff for its second cause of action against the Defendants, incorporates paragraphs I through XV and paragraphs XXI through XXIII of Count One by reference herein, and alleges as follows:

XXIV.

That the Plaintiff relied upon the skill and judgment of the Defendants jointly and/or severally in the manufacturing, processing, supplying, forwarding, preparation, mixing and/or sale of said feed and upon implied warranties of the Defendants and each of them jointly and/or severally, who warranted that the feed was suitable and reasonably fit to be used by the Plaintiff as a feed and/or trace mineral(s) for livestock. Said warranties were not true in that said feed was contaminated and adulterated, and as a proximate result of the breach of implied warranties by the Defendants, the Plaintiff was damaged as hereinbefore alleged.

XXV.

Plaintiff within a reasonable time thereafter gave notice of said Defendants' breach of warranty as herein alleged.

XXVI.

That said adulterated feed did not comply with the laws of the State of South Dakota and the U.S. Food and Drug Regulations and in addition thereto, said feed was not properly labeled or warnings provided thereon.

XXVII.

That the Plaintiff immediately notified the Defendant Doboy and sent feed samples for examination on or about February 27, 1975. Defendant Doboy knew that the Plaintiff's livestock were sick, losing weight and dying. Defendant Doboy took a passive and indifferent attitude to the problems of the Plaintiff, when, in fact, Defendant Doboy made a minimal test of the adulterated feed for fiber, fat and protein; that the Defendant Doboy knew of the continuing problems with the Plaintiff's herd and did nothing more to assist and mitigate the loss of the Plaintiff. It is the allegation of this Plaintiff that had the Defendant Doboy been actively involved in an attempt to mitigate the loss of the Plaintiff at an early stage of the molybdenum toxicity problem, there is reasonable belief that the damages to the Plaintiff's livestock would not have been to the nature and to the extent herein involved. It is the further allegation of the Plaintiff, that once notified of a problem with the Plaintiff's herd that the Defendant Doboy had obligations to actively attempt to mitigate the Plaintiff's damages. That said actions of the Defendant Doboy constitutes commercial bad faith amounting to a tortious act, in addition to the breach of warranty as herein alleged, and constitutes willful and wanton disregard to livestock pursuant to statute and a complete disregard to the rights of the Plaintiff and entitles the Plaintiff to punitive damages against Defendant Doboy in the sum of Seven Hundred Fifty Thousand Dollars and no/100 ($750,000.00).

COUNT THREE
EXPRESS WARRANTY

Plaintiff for it's third cause of action against the Defendant Doboy and Defendant Talbot-Carlson in-

corporates paragraphs 1 through XV and paragraphs XXI through XXIII of Count One, and paragraph XXVII of Count Two and incorporates the same herein by reference as if fully set forth herein in writing, and alleges as follows:

XXVIII.

Plaintiff relied upon the skill and judgment of the Defendant Doboy and Defendant Talbot-Carlson and upon the express warranty of the Defendants which warranty was that the feed was suitable and reasonably fit to be used for the purpose for which it was intended by the Plaintiff as livestock feed. Said Defendants' warranty was not true in that said feed and trace mineral(s) were adulterated and contaminated and as a proximate result thereof, Plaintiff was damaged as hereinbefore alleged.

COUNT FOUR
RES IPSA LOQUITUR

Plaintiff for its fourth cause of action incorporates paragraphs I through XV and paragraphs XXI through XXIII of Count One as if the same were set forth herein.

XXIX.

That the feed and trace mineral(s) purchased by the Plaintiff prior to the feeding of the same by the Plaintiff were in the original form in which it had been manufactured, processed, supplied, forwarded, marketed, prepared, mixed and sold and delivered to the Plaintiff.

XXX.

That the doctrine of res ipsa loquitur is applicable to Plaintiff's action against the Defendants herein in that at

the time of the manufacturing, processing, supplying, forwarding, marketing, preparation, mixing and/or sale of the said feed and at the time it was placed in the bins of the Plaintiff, it was under the exclusive supervision and control of the Defendants. If the Defendants had manufactured, processed, supplied, forwarded, marketed, prepared, mixed, and delivered said feed with reasonable care, instead of in a negligent manner, then and in the ordinary course the same would not have contained the contaminated and adulterated ingredient(s) which caused damage to the Plaintiff's livestock herd as heretofore alleged.

XXXI.
COUNT FIVE
NEGLIGENCE

Plaintiff for its fifth cause of action against the Defendants incorporates paragraphs I thru XV of it's Complaint, and paragraphs XXI through XXIII of Count One and incorporates the same herein by reference as if fully set forth herein in writing, and in the alternate alleges that in the event that the doctrine of res ipsa loquitur is not applicable to Plaintiff's action, Plaintiff alleges as follows:

XXXII.

That Defendants did, in a negligent, careless, reckless and wrongful manner, manufacture, process, supply, forward, market, prepare, mix, promote and/or sell adulterated livestock feed and trace mineral(s) to the Plaintiff as hereinbefore alleged.

XXXIII.

Defendants are negligent as a matter of law.

XXXIV.

Defendants knew, or should have known, through the exercise of ordinary care, that said feed and/or feed ingredient(s) and/or trace mineral(s) were potentially dangerous to livestock and by virtue thereof had a duty to warn of such danger where injury and damage to livestock can reasonably be anticipated if such warning is not given and that the breach of such duty is negligence.

XXXV.

Defendants failed to inspect and or test the livestock feed and the feed ingredient(s) and the trace mineral(s) for molybdenum, an adulterated substance, herein involved and that the breach of said duty constitutes negligence.

WHEREFORE, Plaintiff prays judgment against the Defendants as follows:

(1) That Plaintiff recover from Defendants, jointly or severally, damages in the sum of $1,750,000.00;

(2) That Plaintiff recover from Defendants, jointly or severally, punitive damages in the sum of $1,750,000.00;

(3) That Plaintiff recover from Defendant Doboy additional punitive damages in the sum of $750,000.00;

(4) That Plaintiff recover interest costs and expenses as have or may hereafter be incurred, and;

(5) For such other relief as the Court deems just and equitable in the premises.

Dated this 9th day of March, 1976.

s/ Thomas A. Kolker
Thomas A. Kolker
Attorney for Plaintiff
Box 487
Ipswich, So. Dak. 57451

DEMAND IS HEREBY MADE FOR A TRIAL BY JURY

ANSWER OF APPALACHIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED METALS & MINERAL CORPORATION,

Plaintiff,

-against-

HARTFORD ACCIDENT & INDEMNITY COMPANY and APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendants.

Index No.: 76 Civ. 3807
Hon. Judge Haight

Defendant, APPALACHIAN INSURANCE COMPANY OF PROVIDENCE (hereinafter referred to as "APPALACHIAN") by its attorneys, ABRAMS & MARTIN, P.C., answering the complaint of the plaintiff, alleges:

AS AND FOR AN ANSWER TO THE FIRST CLAIM FOR RELIEF:

1. Denies each and every allegation contained in the Paragraphs of plaintiff's complaint designated "1", "4", "6", "8", "10", "19" and "20", except admits that the defendant, APPALACHIAN, issued its policy or contract of insurance number 71097 and respectfully refers this Court to the terms and conditions of same, as well as all questions of law in regard to the insurance contract.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the Paragraphs of plaintiff's complaint designated "2", "3", "14", "15", "16", "17", "23" and "24".

3. Denies each and every allegation contained in the Paragraphs of plaintiff's complaint designated "11", "12", "13" and "18", except admits notice by plaintiff of an action instituted in the United States District Court for the District of South Dakota. The defendant respectfully refers this Court to the pleadings and proceedings in that action.

4. Denies each and every allegation contained in the Paragraphs of plaintiff's complaint designated "21", "22" and "25".

AS AND FOR AN ANSWER TO THE SECOND, ALTERNATIVE CLAIM FOR RELIEF:

5. Repeats, reiterates and realleges each and every answer to Paragraphs of plaintiff's complaint designated "1" through "25" in answer to Paragraph of plaintiff's complaint designated ' 26".

6. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the Paragraphs of plaintiff's complaint designated "27", "28", "29" and "30".

AS AND FOR AN ANSWER TO THE THIRD CLAIM FOR RELIEF:

7. Repeats, reiterates and realleges each and every answer to Paragraphs of plaintiff's complaint designated "1" through "25" and "27" through "30" in answer to Paragraph of plaintiff's complaint designated "31".

8. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the Paragraph of plaintiff's complaint designated "32".

AS AND FOR AN ANSWER TO THE FOURTH AND ALTERNATIVE CLAIM FOR RELIEF:

9. Repeats, reiterates and realleges each and every answer to Paragraphs of plaintiff's complaint designated "1" through "25" and "27" through "30" in answer to Paragraph of plaintiff's complaint designated "33".

10. Denies each and every allegation contained in the Paragraph of plaintiff's complaint designated "34".

AS AND FOR AN ANSWER TO THE FIFTH CLAIM FOR RELIEF:

11. Repeats, reiterates and realleges each and every answer to Paragraphs of plaintiff's complaint designated "1" through "25", "27" through "30" and "31" through "32" in answer to Paragraph of plaintiff's complaint designated "35".

12. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the Paragraph of plaintiff's complaint designated "36".

WHEREFORE, defendant, APPALACHIAN, respectfully demands that this Court determine the liability of the defendants to each other and to the plaintiff in this action and find that the HARTFORD ACCIDENT & INDEMNITY COMPANY is liable to the plaintiff for the defense and costs of this action and the action instituted in the United States District Court, South Dakota, in accordance with the terms and conditions of the contract of insurance issued by the defendant HARTFORD ACCIDENT & INDEMNITY COMPANY and that APPALACHIAN's liability, if at all, is limited to an amount in excess of that due and owing by the defendant, HARTFORD ACCIDENT & INDEMNITY COMPANY.

Dated: New York, New York
October 5, 1976.

ABRAMS & MARTIN, P.C.

By
A Member of the Firm
Attorneys for Defendant
APPALACHIAN INSURANCE
COMPANY OF PROVIDENCE
Office & P.O. Address
92 Fulton Street
New York, New York 10038
(212) 577-0270

TO:

PASKUS, GORDON & HYMAN
Attorneys for Plaintiff
Office & P.O. Address
733 Third Avenue
New York, New York 10017

BEREL, NAVARRA & MULLEN, P.C.
Attorneys for Defendant
HARTFORD ACCIDENT & INDEMNITY COMPANY
Office & P.O. Address
19 East 9th Street
New York, New York 10003

ANSWER OF HARTFORD

(Same Title)

DEFENDANT (HARTFORD) DEMANDS A TRIAL BY JURY

Defendant, HARTFORD ACCIDENT & INDEMNITY COMPANY (hereinafter referred to as HARTFORD) by its attorneys, BEREL, NAVARRA & MULLEN, P.C., answering the complaint of the plaintiff alleges:

AS AND FOR AN ANSWER TO THE FIRST CLAIM FOR RELIEF:

1. Denies each and every allegation contained in the paragraphs of the plaintiff's complaint designated and numbered "1", "2", "3", "5", "7", and "9", except admits that the defendant HARTFORD (in consideration of a premium agreed to be paid) issued a policy and/or contract of insurance with endorsements under number 100646637E and renewed under number 10C653293E and respectfully leaves and refers all questions of law including the interpretation, content, and term of the policies to this Court.

2. Denies each and every allegation contained in paragraphs of the plaintiff's complaint designated "22", "23", "24", and "25".

3. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraphs of the plaintiff's complaint designated "4", "6", "8", "10", "18", "19", "20", and "21".

4. Denies each and every allegation contained in paragraphs of plaintiff's complaint designated and numbered "", "12", "13", "14", "15", and "17" (a)(b)(c),

except admits notice of the action instituted against plaintiff in the United States District Court for the District of South Dakota and respectfully refers this Court to all the pleadings and proceedings in said action. Defendant further respectfully refers this Court to the policy and/or contract of insurance endorsements, disclaimer of coverage thereunder and refers all questions of law relative thereto including interpretation to this Court.

AS AND FOR AN ANSWER TO THE SECOND ALTERNATIVE CLAIM FOR RELIEF:

5. Repeats, reiterates and realleges each and every answer to paragraphs of plaintiff's complaint designated "1" through "25" in answer to paragraph of plaintiff's complaint designated "26".

6. Denies each and every allegation contained in the paragraphs of the plaintiff's complaint designated and numbered "27", "28", "29", and "30", and respectfully refers all questions of law alleged therein to this Honorable Court.

AS AND FOR AN ANSWER TO THE THIRD CLAIM FOR RELIEF:

7. Repeats, reiterates and realleges each and every answer to paragraphs of plaintiff's complaint designated "1" through "25" and "27" through "30" in answer to paragraph designated "31" of the plaintiff's complaint.

8. Denies each and every allegation contained in the paragraphs of the plaintiff's complaint designated "32".

AS AND FOR AN ANSWER TO THE FOURTH AND ALTERNATIVE CLAIM FOR RELIEF:

9. Repeats, reiterates and realleges each and every answer to paragraphs of plaintiff's complaint designated

"1" through "25" and "27" through "30" and "31" through "32" in answer to paragraph designated "33" of the plaintiff's complaint.

10. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of plaintiff's complaint designated "34".

AS AND FOR AN ANSWER TO THE FIFTH CLAIM FOR RELIEF:

11. Repeats, reiterates and realleges each and every answer to paragraphs of the plaintiff's complaint designated "1" through "25", "27" through "30", "31" through "32" and "33" through "34" in answer to paragraph of the plaintiff's complaint designated "35".

12. Denies each and every allegation in paragraph of the plaintiff's complaint designated "36".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO THE PLAINTIFF'S COMPLAINT, THE DEFENDANT HARTFORD ALLEGES UPON INFORMATION AND BELIEF:

13. That at all times hereinafter mentioned, the HARTFORD's policy of insurance (referred to and) alleged in the plaintiff's complaint specifically contains an exclusion for a joint venture, and does not provide in the declarations, insurance coverage for ASSOCIATED METALS & MINERALS CORPORATION (hereinafter referred to as MRDC), doing business as a joint or business venture and the culpability resulting therefrom which is the subject of an action in United States District Court for the District of South Dakota.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO THE PLAINTIFF'S COMPLAINT, THE DEFENDANT HARTFORD ALLEGES UPON INFORMATION AND BELIEF:

14. That at all times hereinafter mentioned the plaintiff failed to disclose and specifically designate to the insurer its intention to enter into and/or conduct operations under a contract of joint or business venture with MRDC (nor the risks incidental therein) at any time prior thereto or during the term of the insurance policies of HARTFORD, referred to and alleged in the plaintiff's complaint until plaintiff knew that claim or suit by a third party was imminent.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE TO THE PLAINTIFF'S COMPLAINT, THE DEFENDANT HARTFORD ALLEGES UPON INFORMATION AND BELIEF:

15. That at all times hereinafter mentioned that due to the failure of the plaintiff to disclose to the insurer (HARTFORD) the risks involved in and incidental to said joint or business venture, the subject matter of said venture, the duration of same, the insurer could not compute, rate, classify or receive an insurance premium for said risk. As a result of which, there could be no policy and/or contract of insurance entered into between the plaintiff and the insurer (HARTFORD) which provided coverage for a loss which is the subject of the action in United States District Court for the District of South Dakota.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE TO THE PLAINTIFF'S COMPLAINT. THE DEFENDANT HARTFORD ALLEGES UPON INFORMATION AND BELIEF:

16. That at all times hereinafter mentioned, the plaintiff's failure to disclose to the insurer the material facts of a joint or business venture estops the plaintiff from claiming a declaration of its rights under the policies referred to and alleged in the complaint against the insurer (HARTFORD).

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE TO THE PLAINTIFF'S COMPLAINT. THE DEFENDANT HARTFORD ALLEGES UPON INFORMATION AND BELIEF:

17. That at all times hereinafter mentioned upon information and belief, there was another valid and collectible policy and/or contract of insurance, either primary, joint, concurrent or excess or umbrella which may provide coverage for the loss complained of in the plaintiff's complaint.

AS AND FOR A CROSS-CLAIM AND ALTERNATIVE CLAIM FOR RELIEF AS AGAINST THE CO-DEFENDANT APPALACHIAN INSURANCE COMPANY OF PROVIDENCE. THE DEFENDANT HARTFORD ALLEGES UPON INFORMATION AND BELIEF:

18. That at all times hereinafter mentioned, the defendant APPALACHIAN INSURANCE COMPANY OF PROVIDENCE (hereinafter referred to as APPALACHIAN) issued a policy and/or contract of insurance under policy #71097 known as a special risk policy to the

plaintiff AMMC, for a term from March 1, 1972 to March 1, 1975 which was extended thereafter by binder until May 1, 1975.

19. That at all times hereinafter mentioned said policy and/or contract of insurance issued by APPALACHIAN to plaintiff, AMMC under policy #71097 and the term thereof provided coverage for Umbrella (excess) Liability on all operations of AMMC to the extent that claims arising from said operations are not otherwise covered by any other insurance policy including the HARTFORD policies referred to by AMMC in the main complaint and which are in excess of the retained limit of $25,000.00 up to $100,000.00.

20. That at all times hereinafter mentioned APPALACHIAN has not issued a disclaimer of coverage under its policy for the claims made against AMMC in the pending South Dakota action by Grismer Farms, and other co-defendants.

21. That at all times hereinafter mentioned, APPALACHIAN by the terms of its policy (71097) is bound and obligated to furnish a defense and indemnify AMMC for the ultimate net loss in excess of the retained limits, for the claims presented against AMMC by GRISMER FARMS and others in the South Dakota action where the claims or occurrences are not covered by any underlying policy or any underlying insurance collectible by the insured AMMC.

22. That upon information and belief AMMC's failure to apply for and obtain an underlying policy of insurance for the risk, subject matter, duration of the risk of a joint or business venture and pay an insurance premium for the business or joint venture, the APPALACHIAN policy or contract of insurance (71097) by its terms provides coverage up to the limits of the policy for all claims asserted against AMMC in the South Dakota action and for costs and attorneys' fees in the defense of said action.

23. That upon information and belief, APPALACHIAN had or should have had knowledge of AMMC's joint or business venture with MRDC and received an insurance premium in consideration of said risk, and as such should be estopped from denying coverage, indemnification and a defense to AMMC for any claims which may arise out of the South Dakota action which is the subject of this litigation and up to the limits of APPALACHIAN's policy.

24. That upon information and belief, the APPALACHIAN policy or contract of insurance (#71097) as referred to in the complaint does not contain a provision excluding from coverage the operation of a business and/or joint venture by AMMC.

25. That at all times hereinafter mentioned, the HARTFORD policy or contract of insurance as referred to in the complaint, specifically contains a provision which excludes from coverage the conducting of operations by AMMC as a joint or business venture.

26. That at all times hereinafter mentioned, the HARTFORD insurance policy amongst other things contained the following provisions, to wit:

II. PERSONS INSURED

> "This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in this policy as a named insured".

27. That upon information and belief, for some time prior to the application for and issuance of the said insurance policy by HARTFORD to the plaintiff AMMC, the plaintiff AMMC entered into a joint venture with MRDC and continued its operation with the said MRDC as a joint venture during the existence of said insurance policy and at the time of the loss in question for which plaintiff AMMC seeks coverage.

28. That the very basis for the claim and lawsuit now pending against plaintiff AMMC for which plaintiff AMMC seeks coverage under the terms of its policy with HARTFORD, arises out of plaintiff AMMC's joint venture with MRDC, and is not included and not covered within the terms of plaintiff AMMC's insurance policy issued by HARTFORD.

WHEREFORE, defendant HARTFORD ACCIDENT AND INDEMNITY COMPANY demands judgment adjudging and declaring that:

1. *AS AGAINST THE PLAINTIFF:*

a) The disclaimer of coverage by HARTFORD under the aforesaid policy was proper;

b) HARTFORD is under no duty to defend and indemnify plaintiff against the claims as alleged by the various parties in the pending South Dakota action, and/or for counsel fees, costs and expenses incurred in said South Dakota action by plaintiff,

c) No contract of insurance between plaintiff and HARTFORD existed extending coverage to the operations of AMMC and MRDC which operations have become the subject matter of the pending South Dakota action.

d) AMMC failed to disclose to HARTFORD its intention to enter into and/or conduct operations as a joint venture with MRDC.

e) The HARTFORD policy or contract of insurance contains a specific exclusion as to joint venture operations, such as that engaged by plaintiff AMMC with MRDC.

f) The complaint of the plaintiff be dismissed together with costs and disbursements of this action.

g) And for such other and further relief as to this Court may seem just and proper.

2. *AS AGAINST THE CO-DEFENDANT APPALACHIAN:*

a) APPALACHIAN is liable to the plaintiff for the defense and costs of this action and the action instituted and pending in South Dakota, pursuant to and in accordance with the terms and conditions of the contract of insurance issued by APPALACHIAN.

b) And for such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y. December 13, 1976.

BEREL, NAVARRA & MULLEN, P.C.
* * * * *
Attorneys for Defendant
HARTFORD ACCIDENT & INDEMNITY

TO: PASKUS, GORDON & HYMAN, Attorneys for Plaintiff * * *

ABRAMS & MARTIN, P.C., Attorneys for Defendant * * *

DECISION OF JUDGE IN SOUTH DAKOTA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION
CIV 76-1006

Grismer Farms, Inc.,

Plaintiff

vs.

Domain Industries, Inc., d/b/a Doboy Feeds; Grain Terminal Ass'n.; King Castle, Inc.; Bonewitz Laboratories & Supply Company; Gladwin A. Read and Ray Van Pouche, a partnership, d/b/a Gladwin A. Read Co.; Basic, Inc.; Mineral Research & Development Corp.; Associated Metals and Minerals Co.; and Talbot-Carlson, Inc.,

Defendants.

MEMORANDUM DECISION

Mr. Thomas A. Kolker, of Ipswich, South Dakota, appeared in behalf of the plaintiff;
Mr. Donald J. Porter, of May, Porter, Adam, Gerdes & Thompson, of Pierre, South Dakota, appeared in behalf of the defendant Domain Industries;
Mr. Chester A. Groseclose, Jr., of Richardson, Groseclose, Kornmann & Wyly, of Aberdeen, South Dakota, appeared in behalf of the defendant Grain Terminal Ass'n.;
Mr. Harvey C. Jewett, of Siegel, Barnett, Schutz, O'Keefe, Ogborn & Jewett, of Aberdeen, South Dakota, appeared in behalf of the defendant King Castle, Inc.;

Mr. Carleton R. Hoy, of Davenport, Evans, Hurwitz & Smith, of Sioux Falls, South Dakota, appeared in behalf of the defendant Bonewitz Laboratories & Supply Company;
Mr. Donald R. Shultz, of Lynn, Jackson, Shultz, Ireland & Lebrun, of Rapid City, South Dakota, appeared in behalf of the defendant Gladwin A. Read;
Mr. John B. Wehde, of Benson, Beach, Wehde & Martin, of Huron South Dakota, appeared in behalf of the defendant Basic, Inc.;
Mr. George A. Bangs, of Bangs, McCullen, Butler, Foye & Simmons, of Rapid City, South Dakota, appeared in behalf of the defendant Mineral Research & Development Corp.;
Mr. F.M. Smith, of Woods, Fuller, Shultz & Smith, of Sioux Falls, South Dakota, appeared in behalf of the defendant Associated Metals and Minerals Co.;
Mr. Kennith L. Gosch, of Bantz & Gosch, of Aberdeen, South Dakota, appeared in behalf of the defendant Talbot-Carlson, Inc.

Once again the Court is asked to measure the length of South Dakota's "long-arm" statute.[1] Plaintiff, Grismer Farms, Inc., seeks with this action to recover for losses allegedly sustained as a result of feeding adulterated and contaminated livestock feed. Several defendants involved in the chain of distribution have been joined. Most of these defendants are foreign corporations. With the exception of Associated Metals and Minerals Corporation (hereinafter AMMC) and Mineral Research and Development Corporation (hereinafter MRDC), all defendants through their counsel at the hearing on these motions waived the defense of lack of personal jurisdiction.

From the pleadings, affidavits and supporting

documents, it would appear that AMMC, a corporation organized under the laws of the State of New York, acquired a processing plant in Freeport, Texas. The plant processed "spent catalysts." The former owner of the plant had stockpiled on the site approximately 12,000 tons of hydrated magnesium oxide. AMMC agreed to process the hydrated magnesium oxide and furnish it to MRDC, a North Carolina corporation. MRDC, in turn, sold the magnesium oxide to an Iowa corporation that brokered animal feed ingredients. For the purposes of these motions it is sufficient to note that several more defendants came in contact with the magnesium oxide before it ultimately reached the plaintiff, incorporated into a cattle feed.

Both AMMC and MRDC have filed affidavits which clearly refute any notion that they have transacted any business in South Dakota. However, plaintiff does not argue that it is the transaction of business in South Dakota that subjects defendants to the jurisdiction of this Court, but rather jurisdiction exists because defendants committed an act which resulted "in accrual within this state of a tort action." SDCL (1967) 15-7-2(2).

Several preliminary propositions deserve mention. In a diversity case, a federal district court must apply the law of the forum state to determine persons over whom it may assert personal jurisdiction. Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634 (8th Cir. 1975). The initial burden of establishing jurisdiction rests upon the plaintiff.

> Although a plaintiff seeking to predicate long-arm jurisdiction on the accrual of a tort action within the forum state need not make a full showing on the merits that the nonresident defendant committed the tort, a prima facie showing is required to defeat a motion to dismiss for want of jurisdiction. (citations omitted).

Block Industries v. DHJ Industries, Inc., 495 F.2d 256, 259

(8th Cir. 1974). This showing is to be tested by the pleadings, affidavits and exhibits. Id. at 260.

Turning to the law of the forum state, South Dakota, it is well settled that the applicable long-arm statute is to be liberally construed. The South Dakota Supreme Court opined in *Ventling v. Kraft*, 83 S.D. 465, 161 N.W.2d 29 (1968):

> *** We believe the legislature by enacting the "long arm" statute intended to provide South Dakota residents with maximum protection of South Dakota courts from damages and injuries occasioned them through the acts or omissions, both contracted and tortious, of a nonresident when that nonresident has had the necessary minimal contacts with the state to comply with federal due process. ***

Id. at 34. Given this interpretation, the determination of whether defendants are subject to the jurisdiction of this court will necessarily turn on the Due Process Clause of the Fourteenth Amendment. For if the jurisdictional facts pass constitutional muster, *a fortiori* they lie within the parameters of the South Dakota statute. Cf. *Kulm v. Idaho First National Bank*, 428 F.2d 616 (8th Cir. 1970).

At issue, then, is whether defendants AMMC and MRDC have had sufficient minimum contacts with South Dakota so that subjecting them to the jurisdiction of this court would comply with traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Caesar's World, Inc. v. Spencer Foods, Inc.*, 498 F.2d 1176 (8th Cir., 1974). Five guideposts have been articulated by the Eight Circuit for determining whether personal jurisdiction in a particular case is consonant with due process guarantees:

> (1) The nature and quality of the contacts with the forum state;

(2) The quantity of contacts in the forum state;
(3) The relation of the cause of action to the contacts;
(4) The interest of the forum state in providing a forum for its residents; and
(5) The convenience of the parties.

Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969); *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965).

With the issue thus narrowed, the facts of the instant case can be reviewed in more detail. AMMC is in the business of buying and selling metals and minerals throughout the world. According to an affidavit of the vice-president of AMMC, none of that buying and selling involved commodities produced, stored or consumed in South Dakota. AMMC has no agents or employees in South Dakota and has never qualified to do business here. When AMMC acquired the processing plant in Freeport, Texas, it did agree to process 12,000 tons of magnesium oxide and furnish it to MRDC. The complaint and accompanying affidavits filed by plaintiff charge that this magnesium oxide was contaminated by molybedum, a substance which in sufficient quantities can be highly toxic to cattle.

MRDC is a North Carolina corporation. MRDC has filed affidavits so conclusory in nature as to be of no value to the Court. William F. Drinkard, president of MRDC, states in an affidavit "(t)hat neither the Corporation nor its agents have committed any act which would result in the accrual within the State of South Dakota of a tort action." This "remarkable" pronouncement certainly exudes confidence on the part of MRDC but does little to inform the Court of the basis for such a sweeping statement. Affidavits filed by defendant, Bonewitz Laboratories & Supply Company, in opposition to MRDC's motion to dismiss, indicate that MRDC's sales manager attended a

national meeting of the American Feed Manufacturers Association in Chicago. While there, the sales manager solicited orders from Bonewitz for magnesium oxide. Followup letters between these two defendants included a letter from Bonewitz to MRDC which specifically revealed that South Dakota was included in Bonewitz's primary marketing area. MRDC eventually sold magnesium oxide, allegedly contaminated with molybedum, to Bonewitz. The contaminated magnesium oxide ultimately reached the plaintiff in the form of cattle feed which was fed in South Dakota. (I express, of course, no opinion on the merits of plaintiff's claim but merely accept the charges in the pleadings and affidavits as true for the purpose of this motion. *See Midland Forge, Inc. v. Letts Industries, Inc.*, 395 F.Supp. 506 (N.D. Ia. 1975)).

From the above summary it becomes clear that these two defendants have had very few direct "contacts" with South Dakota. That fact alone, however, does not insulate a tortfeasor from jurisdiction in the state where his tortious conduct resulted in injuries. The day has passed when a manufacturer whose market place is unlimited can place his product in the flow of interstate commerce and yet insist that the plaintiff come to him should losses result. *See generally, Jetco Electronic Industries v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); *Dawkins v. White Products Corp. of Middleville, Michigan*, 443 F.2d 589 (5th Cir. 1971); *Duplee Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969); *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968); *Thornton v. Toyota Motor Sales*, 397 F.Supp. 476 (N.D. Geo. 1975); *Behlke v. Metalmeccania Plast, S.P.A.*, 365 F.Supp. 272 (E.D. Mich. 1973); *Breedlove v. Beech Aircraft Corporation*, 334 F.Supp. (N.D. Miss. 1971); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

Tennessee has a long-arm statute substantially like

South Dakota's. In *McCoy v. Wean*, 67 F.R.D. 491 (E.D. Tenn. 1973), the federal district court remarked that

> (w)here a defendant voluntarily places its products into the channels of national commerce, it subjects itself to the operation of the (Tennessee Long-Arm Statute), for the purpose of responding to a plaintiff's claim that he was injured in Tennessee as a result of tortious acts committed in another state or other states. The fact that the product was brought into Tennessee after purchase in another state, to which transaction the defendant was not a party, does not insulate the defendant from substituted service of process. ***

Id. at 493. In a case involving a defective press machine, *Metalmeccania Plast, S.P.A., supra*, the Court was faced with a motion to dismiss for insufficient contacts. The defendant contended that they had only five presses of that type in the whole United States, only one of which was in Michigan. Nevertheless, the Court held that jurisdiction existed and commented:

> The theory on which this statute is based is that manufacturing and placing a product into the stream of commerce, knowing that it is to be used somewhere and that it might cause injury, creates a relationship between the state where the injury occurs and the defendant manufacturer close enough to justify the exercise of judicial power by the courts in the state of injury. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Metalmeccania Plast, S.P.A., supra at 274. The Michigan long-arm statute is also very similar to that of South Dakota. MRDC had every reason to know that the magnesium oxide would reach South Dakota because their own customer, Bonewitz, told them as much. AMMC

might not have had reason to know the particular destination of the product but certainly released it into the flow of interstate commerce.

The Eight Circuit Court of Appeals recently discussed the South Dakota long-arm statute in *Block Industries v. DHJ Industries*. 495 F.2d 256 (8th Cir. 1974). In *Block* the defendant attempted to join four foreign corporations as third party defendants. The four were all in the business of manufacturing fabric. At that stage of the proceedings, defendant Block Industries did not even know which of the four third party defendants, if any, had produced the cloth ultimately found in the shirt which allegedly burned the plaintiff. On this record the Eighth Circuit affirmed the District Court's[2] dismissals for lack of personal jurisdiction. However, the Court added that

> (w)hen it (Block Industries) has ascertained the manufacturer of the fabric used in the shirt, it may be leave of court, renew its third party complaint against such manufacturer.

Id. at 260. Block Industries did eventually determine which of the four had most probably manufactured the fabric and Springs Mills was joined by the trial court.[3] In the instant case, plaintiff has been able through various tests and records to ascertain that the magnesium oxide in question was produced by AMMC and MRDC.

It is the ruling of the Court that the motions to dismiss for lack of personal jurisdiction filed by AMMC and MRDC are denied. This ruling, of course, expresses no opinion on the merits of plaintiff's complaint. That awaits the presentation of evidence at trial. Counsel for plaintiff is directed to prepare the appropriate order.

Done and entered at Sioux Falls, South Dakota, this 14th day of June, 1976.

BY THE COURT:
s/
Chief Judge

Footnotes

1. The statute reads in pertinent part:
SDCL (1967) 15-7-2. *Acts within the state subjecting persons to jurisdiction of the courts.* — Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, or through an agent, of any of the following acts:
***
(2) The commission of any act which results in accrual within this state of a tort action; ***

2. The Honorable Axel J. Beck.

3. In fact I presided over the trial of this case in the Northern Division this spring.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED METALS & MINERALS CORPORATION,

Plaintiff,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

and APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendants.

DEPOSITION OF WILLIAM DRINKARD

Pursuant to Notice and Stipulation of counsel, I, Richard D. Graham, Commissioner and Notary Public, in and for the State of North Carolina, proceeded to take the Deposition of William Drinkard on the 25th day of January, 1977, beginning at 10:30 o'clock A.M. in the offices of Mineral Research & Development Corporation, 4 Woodlawn Green, Suite 232, Charlotte, North Carolina.

The Plaintiff in this case was represented by Philip H. Schaeffer, Esquire, Attorney at Law, New York, N.Y.

The Defendants in this case were represented by Harold B. Berel, Esquire, Attorney at Law, New York, N.Y., representing Hartford Accident and Indemnity Company; and Barry D. Lesser, Esquire, Attorney at Law, New York, N.Y., representing Appalachian Insurance Company of Providence.

Also present was Mr. Charles Davis, vice president of Mineral Research & Development Corporation.

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN THE ATTORNEYS FOR THE RESPECTIVE PARTIES HEREIN:

1. That certification and filing of this Deposition shall be waived; and that it may be sworn to by the witness before a Notary Public of the State of North Carolina.

2. That all objections, except as to form, are reserved.

3. That the attorney for the Defendant, Hartford Accident & Indemnity Company, shall furnish copies of the transcript at no charge for each of the attorneys for the other parties in this action and for the non-party witness.

WILLIAM DRINKARD, being first duly sworn, testified as follows:

DIRECT EXAMINATION: (By Mr. Berel)

Q. For the sake of brevity and for clarity, Mr. Drinkard, if and when I use the word "Mineral", that will mean Mineral Research & Development Corp. If I use the word "Gulf," then that will mean Gulf Chemical and Metallurgical Company. If I use the word "Associated Metals and Minerals Corp", I will use the word Associated which will stand for Associated Metals and Minerals Corporation. Is that understood?

A. I understand.

Q. Now, Mr. Drinkard, if you don't understand the nature of my question, feel free to say so.

A. Fine.

Q. What is your occupation, sir?

A. I am president of Mineral Research & Development Corporation.

Q. And how long have you been president of Mineral?

A. Since it started. Fifteen years.

Q. Are you a stockholder of Mineral?

A. Yes.

Q. What percent of stock in Mineral do you have?

A. I don't know the exact percentage right now.

Q. Is there more—

MR. SCHAEFFER: (Interrupting) Mr. Drinkard does not have counsel. Woudln't it be significant and sufficient if you were to ask him if he was a substantial stockholder in the company?

MR. BEREL: Mr. Schaeffer, while on the formal record it would appear that Mr. Drinkard does not have counsel, let the record reflect that you and I and Mr. Lesser, the Attorney for Appalachian Insurance Company, were on the same airplane coming here from New York and, when we arrived at the airport, we met with Mr. Drinkard and, up until this point when we entered the examining room, you apparently have had some contact prior to and at this time with Mr. Drinkard. You are sitting along side of him. I know that the table is small, but it would appear—and I am permitted to make a comment if I may—that, while he does not have counsel, you have apparently have had some contact, not on a social basis but on a business basis, with him in relation to these affairs.

MR. SCHAEFFER: Mr. Berel, I am shocked by what you say since it was disclosed, repeatedly, to you that Mineral Research & Development Corporation, being the joint venture partner of Associated Metals and Minerals Corporation—I have been in touch with Mr. Drinkard and his attorneys from time to time. Indeed, one of the reasons that it is necessary to have had close cooperation between Mr. Drinkard, me, Associated, Mineral and Mr. Byram, who is the Attorney for Mineral, has been the persistent, obdurate and stubborn refusal of Hartford to recognize its responsibilities and to defend Associated Metals & Minerals Corporation in this action. I am shocked at your comment. It comes as no surprise, I am sure, to you that we have had this kind of commentary. I am not appearing here as counsel but, understanding the attitude that you are

taking in this proceeding, I will continue to advise Mr. Drinkard of his rights, and I am startled that a lawyer of the State of New York would not want me to.

Q. Mr. Drinkard, your company was served with a Subpoena to testify as a non-party witness, is that correct?

A. That's correct.

Q. When you received that subpoena, did you consult with an attorney?

A. Yes.

Q. And that attorney is whom, sir?

A. Mr. Porter Byrum.

Q. Is Mr. Byrum an Attorney representing Mineral or you or both?

A. He is representing Mineral.

Q. So that prior to the time that you came here, you had some consultation with an attorney representing Mineral?

A. Yes.

Q. And you know that, as president of Mineral, you have the right to have counsel on behalf of Mineral to appear here, is that right?

A. Right.

Q. And you, as president of Mineral, have chosen not to have counsel to represent you at this proceeding, is that right?

A. Essentially.

Q. Well, if there is anything un-essential about it, will you please tell me?

A. Mr. Byrum did not feel the need to come.

Q. And you have taken your attorney's advice on behalf of Mineral?

A. Yes.

Q. Now, getting back to these proceedings, you said that you have been the president of Mineral for approximately fifteen years since the date of the inception of Mineral, is that right?

A. That's correct.

Q. I then ask you and ask you again whether or not you own any stock in Mineral?

A. I do own stock.

Q. Is that stock a controlling or a non-controlling interest?

A. Non-controlling.

Q. Most of the questions that I will ask you will deal with the years 1973 through and including 1975 and possibly a month or two in 1976. Do you understand that, sir?

A. Yes, sir.

Q. Whatever I ask you will not necessarily deal with today's date and time unless I point that out to you.

A. Yes, I understand.

Q. What was the business of Mineral sometime between 1973 and 1975, the principal business?

A. The principal business is chemical manufacturing and chemical sales.

Q. And when you say chemical manufacturing, does Mineral have facilities, plant facilities, in any states of the union?

A. Yes, in two.

Q. What two states?

A. In Texas and in North Carolina.

Q. Now, the chemical manufacturing that is performed in Texas, is that located in any particular city or cities?

A. In the Freeport, Texas area, I don't think it's within any particular incorporation.

Q. But it's located in Freeport, Texas?

A. And the vicinity of Freeport, Texas. The mailing address is Freeport.

Q. Of course you realize that we are talking again only of '73 through '75 and perhaps a little overlapping after '75. Do you understand that, sir?

A. Yes.

Q. Now in North Carolina, where is the chemical manufacturing plant?

A. Harrisburg, North Carolina.

Q. The chemical manufacturing that is conducted in Freeport, Texas consists of what chemicals that are manufactured?

A. Zinc Chloride and Zinc Carbonate.

Q. And the manufacturing plant that is conducted in North Carolina, Harrisburg, North Carolina, consists of what?

A. About 30 or 40 different products, a wide variety. Let's just classify them by markets. We have catalyst systems for wash and wear textiles. We have agricultural fungicides. We have wood preservatives, and we also manufacture zinc chloride.

Q. Now, for the chemical manufacturing plant that is conducted in Freeport, Texas, how long has the chemical manufacturing plant been conducted in Freeport, Texas by Mineral, approximately?

A. You are talking about as of today?

Q. No, sir. Again, unless I say—

A. (Interrupting)—But I have to have a time reference.

Q. All right, from the inception until today.

A. From the inception until today, there was no manufacturing until, essentially, '73. May we go off the record for just a minute?

DISCUSSION OFF THE RECORD

Q. Mr. Drinkard, I believe that you just indicated, from memory, that there was no manufacturing in Freeport, Texas until 1973—

A. (Interrupting)—Well, Mr. Davis would know better about it than I would. It would be '74.

Q. I see. After a short consultation with Mr. Davis, who is with Mineral, your better recollection is that manufacturing did not commence, is that what you are saying, until 1974?

A. That is correct. We were at the site, but we were only building the plant.

MR. SCHAEFFER: Let the record show that Mr. Davis has left the room.

Q. Now, when you refer to "site" at Freeport, can you tell us when Mineral first came to the site of Freeport? Do you understand my question?

A. Yes, sir. I could be specific if we got into the records on some of these things. I would say approximately '72.

Q. Now, since we are conducting this examination at the principal office of your corporation—This is the principal office?

A. Yes.

Q. If you need some corporate records to refer to, we will certainly take the time out to ask for your records and look through your records if you wish time to reflect on same.

A. Let me say that if any of these dates are very critical, from either side, I would be very happy to be completely specific, but it would take time.

Q. We would like for you to be as specific as you can from your memory, and if your memory is not the best calculator, then we would appreciate the records and I may impose upon you to produce that if you have it so that we can get a better time period.

MR. LESSER: May we go off the record for a minute, Harold?

MR. BEREL: Sure.

DISCUSSION OFF THE RECORD

Q. Now, sir, the plant facilities at Freeport, Texas, were they owned by Mineral in the 1973?

A. You are talking about our facilities? Yes, our facilities are owned by us.

Q. In 1973?

A. Un Huh.

MR. LESSER: Wait a minute. Let's just ask him to clarify that a little. The Testimony was that the facilities were under construction rather than completed.

MR. BEREL: No, no. The manufacturing facilities were under construction. (To Mr. Drinkard) Is that correct?

A. Yes, un huh.

Q. The plant building itself was owned by Mineral as of what year?

A. As of '72, but—

MR. SCHAEFFER: Mr. Berel, maybe it would be appropriate for Mr. Drinkard to explain what facilities are maintained by his company in Freeport, Texas and when they were constructed.

MR. BEREL: Well, that's what I was getting into, including the land ownership and whether they were buildings that were just leased or—

MR. SCHAEFFER: Why don't you ask him that question and then he can give us a full and complete answer?

A. I see the question as being—I am not trying to be antagonistic—but I see the question as being misleading because they were our facilities, our buildings that we operated in were owned by us.

Q. How many buildings did Mineral own in Freeport, Texas in the year 1972?

A. Approximately four.

Q. And these four buildings were manufacturing facilities?

A. They were just buildings. They had no manufacturing capabilities.

MR. LESSER: Would you establish, Mr. Berel, whether these were all in the same area?

MR. BEREL: That's just what I was getting to.

Q. And where were these buildings located in Freeport, Texas?

A. On the former site of the I.M.C./Laveno operation.

Q. On the I. (voice trails off)

A. International Minerals & Chemicals/E. J. Laveno.

Q. And when did Mineral acquire these four buildings that were located on the former site of the Laveno operation?

A. As I recall, in December of '71. I would have to look that up. I think we had an option in '71 which we did not exercise until '72.

Q. And these four buildings, for what purpose did Mineral purchase them?

A. For the manufacture of zinc chemicals. We had a contract which predated this with Dow chemical which required us to process a certain quantity of zinc.

Q. So that when Mineral purchased these four buildings in Freeport, Texas, did it also purchase the land on which the buildings were?

A. Yes.

Q. And did Mineral purchase the land and the buildings solely for Mineral or in conjunction with anyone else at that time?

A. Solely for Mineral.

Q. Now, when the buildings and land were purchased, did Mineral acquire anything else in Freeport, Texas other than the four buildings and the land?

A. No.

Q. By the word "acquire" that I used—

A. (Interrupting)—Have title?

Q. I mean, was there any purchase of any personal

property or chemicals or anything of that nature that were purchased along with the buildings and the land on which the buildings were?

A. The contracts, obligations, title and everything was all as such, period.

Q. Now, when the buildings were purchased, were the buildings suited for the purpose of the manufacture of zinc chemicals, or did that come at a later time?

A. Maybe we had better hold it for a second there. You can do manufacturing in any sort of a building—and the buildings were not particularly suited.

Q. By that I mean, was the equipment that Mineral needed to manufacture zinc chemicals already on the facility?

A. No, sir. All the equipment had to be brought in.

Q. And did Mineral bring in the equipment at some point?

A. Yes.

Q. And when did Mineral bring in the equipment?

A. During the year '72 and '73.

Q. '72, '73?

A. (Nods head affirmatively).

Q. And at that point Mineral was still conducting the operation solely for the business of Mineral, is that right?

A. There was no operation conducted in terms of a business or profit making operation.

Q. I mean whatever was brought in the way of equipment?

A. Yes, sir, one hundred percent.

Q. When did manufacture of zinc chemicals actually begin at those buildings, if they began at all?

A. In '74.

Q. So, we have the year of 1973. Was any manufacturing of any sort conducted by Mineral at those four buildings in Freeport, Texas in the year of '73?

A. No.

Q. Sir, I show you a document that is labeled contract and consists of four pages and ask you if you recognize the document, it's a photocopy of a document, and ask if you recognize your signature on it?

A. Yes, I do.

(Document marked Mineral No. 1)

Q. Now, this Mineral No. 1 which I have just shown you bears your signature, is that right?

A. That is correct.

Q. There is an indication here (indicating document) that you signed on September 10 of 1974?

A. That's correct.

Q. Now, there is also an indication it was signed on July 16, 1973 by E. B. King and W. Henning, president and vice president, respectively, of Gulf?

A. Yes.

Q. Prior to July 16, 1973, did Mineral enter into any negotiations for the, or what developed into, this formal or formalized agreement?

A. Oh, yes.

Q. Can you tell me, sir, whether you participated, personally, in those negotiations?

A. Yes, I did.

Q. When did those negotiations first commence, the approximate date? Do you need your records to refresh your memory?

A. A lot of it would be verbal. Let's just say a period of, roughly, a year before the Gulf signature. I am not trying to be specific and say exactly 12 months.

Q. I understand that. It was within a year before—

A. (Interrupting)—At least a year. During the period of at least a year and a number of meetings.

Q. So that would take us back at least to sometime in 1972?

A. (Nods head affirmatively).

Q. Is that right?

A. I would say that most of the negotiations were held during the first six months of '73.

Q. And where were those negotiations held?

A. Mostly in Texas.

Q. In Freeport?

A. Yes, essentially.

Q. Did you personally attend those negotiations?

A. Yes, essentially.

Q. And did Mr. King personally attend, or someone else?

A. Mr. King.

Q. Did anyone else attend with Mr. King on behalf of Gulf, if you remember?

A. Mr. Grether would be at some of the meetings. Don Grether is the manager of Gulf's operation in Freeport.

Q. Did you keep—when I say "you," I mean personally or on behalf of Mineral—any notes or records of the negotiations that were held from the time—

A. (Interrupting)—We have some correspondence that passed between us. I don't recall the specific details in the correspondence. Like I say, I am afraid that most of it was verbal.

Q. Was not verbal, you say?

A. Was verbal.

Q. Now, the correspondence that passed between you, do you have copies of that, or does Mineral have copies?

A. Yes, sir, it would be available.

Q. It is available?

A. Un huh.

Q. Do you agree to provide us with copies of that correspondence?

A. I will give you the files and you can take a look and take what you like.

Q. Fine. Is that an extensive, large folder?

A. Well, most of it is all packed together going into these negotiations and going into this other—the case of Grismer Farms.

Q. These are all in one file, is that what you mean?

A. Yes, sir. We may be able to segregate it; I would have to take a look at it.

Q. When did Gulf become the joint owner of 12,000 tons of Hydrated Magnesium Oxide as indicated in the preamble clause of this document?

MR. LESSER: I am going to OBJECT to the form of that question on the foundation of that question.

MR. BEREL: All right, I will change the form.

Q. Mr. Drinkard, at the time that you began your negotiations with Gulf, what was located on the premises of M.R.D.C.? This is in Freeport, Texas.

MR. LESSER: I don't mind your leading him a little, but we don't have to listen to what was in the four buildings and everything else.

Q. What was located there, other than the buildings, if anything?

A. Some hydrated magnesium oxide.

Q. Approximately, what quantity?

A. Approximately, 12,000 tons.

Q. And this 12,000 tons—Do you know who the owner of the 12,000 tons was when the negotiations began with Gulf?

MR. SCHAEFFER: Which negotiations are you talking about? The reason I OBJECT is that I understand that at some point in time, Gulf entered a presence in the vicinity of the Mineral Research operation.

MR. REBEL: Entered a what, Mr. Schaeffer?

MR. SCHAEFFER: Became present. It began or opened up its own facilities, andI do no think that it is clear what you mean by negotiations. Do you mean the negotiations for the leasing of facilities, or what?

MR. BEREL: I am talking about the negotiations which led up to this written document which is labeled Mineral 1.

MR. SCHAEFFER: I don't see how you can

distinguish one from the other. I OBJECT to the form of the question.

MR. BEREL: Frankly, I don't see the basis for your objection.

MR. LESSER: Why don't you just trace the ownership of the magnesium oxide. Then you will not have to—

MR. BEREL: That's what I am trying to do.

Q. Mr. Drinkard, I believe you just stated that there were 12,000 tons of hydrated magnesium oxide located on the premises of M.R.D.C. at Freeport, Texas at the time that the negotiations first began with Gulf which eventually resulted in the Mineral Research Exhibit here. Is that right?

A. I wouldn't say that the presence, necessarily, resulted in that, but it did—

Q. (Interrupting)—I am just talking about the fact that there was 12,000 tons of magnesium.

MR. SCHAEFFER: Mr. Berel, the reason there is some confusion here is because you keep on saying when the negotiation for the joint venture agreement started—negotiation which led to it started—but I don't think you can distinguish that from other negotiations he may have had with Gulf. It's all part of the same parcel. Now, I have no objection to your getting into that, but I think the answers are misleading for that reason, or can be.

MR. BEREL: Well, what I am interested in is the negotiations which led up to the joint venture agreement. There is no secret about that and—

MR. SCHAEFFER: (Interrupting)—Well, why don't you ask him when he first started discussing with Gulf their taking space at Freeport and what the situation was at that time?

MR. BEREL: I don't know what they discussed, and that is just what I was trying to get to.

MR. LESSER: May I just suggest, for the moment, at least, that you treat these as two separate subjects. One

being the negotiations and the other being the hydrated magnesium oxide, and I don't think we will have any trouble.

MR. BEREL: That's exactly what I am trying to do.

Q. Mr. Drinkard, you had negotiations with Mr. E. B. King and possibly or probably someone else with Gulf, and most of the negotiations were held in the first six months of 1973, is that right?

A. Yes, un hun. In reference to this? (Indicating paper)

Q. In reference to this meaning Mineral Exhibit No. 1. Now, when the negotiations first began, Mineral owned four buildings and the land at Freeport, Texas for the manufacturing of zinc chemicals, is that right?

A. When these negotiations began, Gulf already had a lease that gave them twelve acres of the land and one building. They were completely autonomous. They had their own operation.

MR. LESSER: This was the land owned by Mineral?

A. We owned the land, but they leased it from us. It was set up so that they were a completely autonomous operation, and we were restricted from even going on the property.

MR. SCHAEFFER: There was a fence, was there not?

MR. BEREL: That's just what I was going to get into.

Q. There was a fence separating—

A. Yes, sir, the one building on their property, and on this property, they constructed their operation.

Q. And this lease was a written lease, is that right?

A. Yes, sir.

Q. Do you have a copy of that lease?

A. Somewhere, yes.

MR. SCHAEFFER: Let the record show that a copy has been furnished and duplicated by the attorneys for Hartford. Just as the correspondence between Associated and Mineral, concerning the joint venture, had been

previously a long time ago, weeks ago, produced and given to Mineral, I mean Hartford.

Q. And the lease for this one building for this autonomous operation of Gulf was a lease that you negotiated, sir?

A. Yes.

Q. And the business of Gulf that was to be conducted at that one building was what, sir?

A. Was not disclosed.

Q. Was it restricted in any way under the terms of your lease, by Mineral's lease?

A. No, sir, it was just their business. They didn't care to give me a detailed description of it.

Q. Of the three buildings that were left that were the property of Mineral, and when negotiations were first commenced in 1973, was Mineral actually manufacturing anything at those three buildings?

A. What time periods?

Q. Well, you said the first six months of 1973 was when most of the negotiations were held with reference to this Exhibit.

A. To this Exhibit? (Indicating Mineral No. 1).

Q. Starting with those six months. During those first six months, was any manufacturing being conducted by Mineral at those three buildings?

A. No, sir.

MR. LESSER: Mr. Berel, I believe that the witness has already testified that no manufacturing started until '74. In fact, I believe he has testified to that twice.

A. Yes, that's correct.

Q. Now, taking a look at Exhibit Mineral 1, I believe, sir, that there is an indication that Mineral and Gulf are the owners of 12,000 tons of hydrated magnesium oxide, is that right, sir?

MR. LESSER: I OBJECT to this. It seems to me that you are taking the whole thing out of context. You have

established that Mineral owned 12,000 tons of hydrated magnesium oxide, at some time. Now, I don't know whether you are talking about a different 12,000 tons or the same 12,000 tons.

MR. BEREL: That's what I am trying to find out.

MR. LESSER: Well, why don't you ask him about the 12,000 tons you established? Why don't you, in fact, start by asking him where it came from and what it came from?

Q. Now, the hydrated magnesium oxide that you mentioned earlier—mainly the 12,000 tons that was the property of Mineral—when was that purchased by Mineral?

A. The 12,000 tons was purchased from I.M.-C./Laveno in '72.

Q. And when it was purchased, had it already been on the site?

A. Yes, sir. It had been there for a long time.

Q. And was it purchased at the time that the four buildings were purchased?

A. No, sir.

Q. It was purchased separately?

A. Yes, sir.

Q. Now, at the time that Mineral first entered into negotiations with Gulf during the first six months of 1973, was Mineral still the owner of that 12,000 tons of hydrated magnesium oxide?

A. Gulf owned half of it.

Q. When did Gulf become the owner of half?

A. Gulf purchased half from I.M.C., and we purchased half.

MR. LESSER: (To Mr. Drinkard)—Does that mean that you both own 6,000 tons?

A. Yes, sir.

Q. That was in 1972?

A. Yes, sir.

Q. So that when Gulf purchased and Mineral pur-

chased, was that one formal document that was entered into with I.M.C. for the purchase of the 12,000 tons, or did you each separately purchase 6,000 apiece?

A. One transaction—well, no, two separate checks were issued. We paid—

MR. SCHAEFFER: But I think it's one agreement.

A. That's right.

MR. SCHAEFFER: You have a copy of the agreement.

MR. BEREL: I understand that Mr. Schaeffer. I just want to get this for the record.

Q. Now, the purchase itself, had you had any discussions with Gulf prior to or at the time of the purchase as to the half interest that Mineral had in that 12,000 tons and the half interest that Gulf had in the 12,000 tons?

A. Well, . . . (Voice trails off)

Q. What I mean is, were your plans to utilize that 6,000 tons solely for Mineral that it was purchased?

A. It was looked at either way. There was no understanding between the companies. We could have used it ourselves, or it could have been sold as such.

Q. When you say, "sold as such", how is magnesium oxide sold as such? Is it bagged or what happens to it, sir?

MR. LESSER: Excuse me, Mr. Berel. I just want to make sure that we are all talking about the same thing, and I don't know. You just used the term "magnesium oxide." The original term I heard was "hydrated magnesium oxide."

MR. BEREL: When I use the term "magnesium oxide", I am referring to hydrated magnesium oxide.

MR. SCHAEFFER: No, no. You can't do that, it's not possible.

MR. BEREL: Correct all the statements I made about magnesium oxide. I mean and I meant hydrated magnesium oxide.

MR. SCHAEFFER: Well, let the record stand as it is

with that amendment because I don't know what questions were asked before about magnesium oxide, but there is a difference between hydrated magnesium oxide and other kinds of magnesium oxide.

Q. Could you tell us about that difference between magnesium oxide and hydrated magnesium oxide?

A. Magnesium oxide reacts with moisture to pick up and form a hydrated compound that is very stable. It contains approximately 30% moisture and 70% magnesium oxide, but it's still a dry white powder. Only upon heating will the 30% water be lost and then you have the standard commercial grade of magnesium oxide.

Q. And the standard commercial grade of magnesium oxide is not hydrated, is that right?

A. Correct.

Q. And does that mean that the moisture has been removed in order to then be a standard commercial grade as you term it?

A. I am sorry to be so complex, but you also have what is called magnesite which is magnesium carbonate. This is the raw material that Basic Incorporated, for example, uses as their source. And they take this and also run it through a heating operation which draws off the CO2 and gives magnesium oxide. Both wind up with the same process, but if you are going from sea water or something laying on the ground, you are going to have hydrated magnesium oxide.

MR. LESSER: May we go off the record for just a minute?

DISCUSSION OFF THE RECORD

Q. Now, when Gulf and Mineral each purchased the 6,000 tons of magnesium oxide, and I believe you said that you believe that two separate checks were issued?

A. I know they were.

Q. Do you know if the same price was paid by Mineral as was paid by Gulf for the purchase of each one-half interest?

A. Our price was slightly lower.

Q. Now, Mr. Drinkard, at some point, sir, did Mineral and Gulf, when it entered into the negotiations which culminated into this Document that I presented earlier, was that 12,000 tons of hydrated magnesium oxide on the premises of M.R.D.C. at Freeport, Texas the same 12,000 tons, half of which was purchased by Mineral and half of which was purchased by Gulf?

A. Yes.

Q. It was identical?

A. Yes.

MR. LESSER: Could you establish whether that fence had anything to do with separating the 12,000 tons?

MR. BEREL: Yes, that's just what I was about to do.

Q. The agreement reads that the stockpiles were located outside the fenced area, on M.R.D.'s premises at Freeport. Is there any reason for it to be outside the fenced area as opposed to inside?

MR. SCHAEFFER: Why don't you establish where the fence is?

Q. Where was the fenced area on the premises of M.R.D.C.?

A. There were two fences, one around Gulf's property and one around ours. This is really in a non-fenced area that is outside of both fences.

Q. Neutral territory, so to speak?

A. Well, it was our land, but this was land not leased to Gulf. That's the reason for the wording. If you want to be completely precise, there was some on Gulf's land, too. Back inside their fenced area. But, most of it was stockpiled on the land out there.

Q. The amount, I understand, of the hydrated magnesium oxide inside the fenced area of M.R.D.C. was

un-determined, is that it, sir? According to this agreement?

A. We are talking about another amount that was inside. There was an amount—some magnesium oxide—that was inside Gulf's operation, inside their fenced area, that was not part of the purchase agreement with I.M.C.

Q. Now, when Mineral purchased this approximately 6,000 tons of hydrated magnesium oxide and paid its check, did your company have any plans for that 6,000 tons of hydrated magnesium oxide that had been formulated at that time?

A. No, sir. We thought it would be a good investment; we did not have any specific plans.

Q. A good investment. Does that mean that once it had been purchased for purposes of re-sale that anything further would have to be done to it in Mineral's plant or anyone else's plant?

MR. LESSER: I am going to OBJECT to this. You are talking about what he thought and what might have to be done.

MR. BEREL: This is not calling for a conclusion of a witnesses' mise.

MR. LESSER: It certainly is.

MR. BEREL: I am asking about when this witness testified that his company paid for the purchase of 6,000 tons of this hydrated magnesium oxide, and that no specific plans, at that point, were intended for the 6,000 tons other than it being a good investment.

Q. Is that right, Mr. Drinkard?

A. Right.

Q. At some time after the purchase, did Mineral develop any specific plans for that 6,000 tons of hydrated magnesium oxide?

A. We looked at a number of plans.

Q. What were those plans that—

MR. LESSER: OBJECT. What's the difference what they didn't do?

MR. SCHAEFFER: Why don't we find out what they did do?

Q. Was one of the plans the negotiations with Gulf?

A. No, they were mostly plans in terms of trying to find somebody that would buy it as such.

Q. Without any further processing? Just to sell it?

A. Yes, sir.

MR. LESSER: I would ask that you develop a foundation for that, Mr. Berel, as to whether they were prepared in any way or able to process in any further way. Whether a buyer was going to process it, I am sure he couldn't care less.

MR. SCHAEFFER: (To Mr. Drinkard)—At the time that you—In the period 1972 through 1974, did the facilities that M.R.D.C. had at Freeport, Texas have the capacity to calcine as you understand that word?

MR. BEREL: You know, Mr. Schaeffer, your turn will come. Forgive me, sir, but let me conduct this, and let me swim in my own water whether I drown or not.

MR. LESSER: I am interested in some clarity for the record. That's the only thing I'm interested in.

Q. Mr. Drinkard, the negotiations which took place for about six months in Freeport, Texas with Mr. King and Mr. Grether, was any discussion or negotiating had between Mineral and between Gulf concerning at least 6,000 tons of hydrated magnesium oxide owned by Mineral?

MR. LESSER: Mr. Berel, I am going to OBJECT to this whole line unless you are going to tell us, for the record, that you feel that the contract which you have, in fact, offered or have had marked is not the agreement between the parties.

MR. BEREL: I submit, sir, that this contract is not in evidence and that I may be permitted to inquire as to negotiations which led up to this formal agreement.

MR. SCHAEFFER: What is the relevance?

MR. BEREL: The relevancy is that—Well, I don't

think the relevancy is for us to determine at this point. I suggest—

MR. SCHAEFFER: (Interrupting)—I understand that. Why not go down and see the local judge here in North Carolina? Why are we getting into the extensive negotiations between these parties to reach agreement on a contract that you have in front of you?

MR. BEREL: I would like to find out what they meant by what they signed in the contract. There are many words in here such as "setting up the facilities", which can mean one thing to one company and one thing to another individual. Processing, which can mean a hundred different varieties of things, and that's what I would like to ask about.

MR. SCHAEFFER: Well, why don't you ask him then?

MR. LESSER: Do you agree to be bound by his testimony, Mr. Berel, what he thinks?

MR. BEREL: Not what he thinks, but what they did and what they meant by—

MR. LESSER: If you want to ask him what they did, then I have no objection whatsoever. But, when you ask—

MR. SCHAEFFER: (To Mr. Berel)—Why don't you ask him that?

MR. BEREL: When they did something, what they meant by doing or saying something—

MR. LESSER: If they did it, what's the difference what they meant? It's what they did.

MR. BEREL: Certain words were used in the agreement. What the parties meant by the use of those terms, that's what I would like to find out.

MR. LESSER: You can't ask him what the parties meant. Maybe you could ask him what he meant.

MR. BEREL: What Mineral intended.

Q. Mr. Drinkard, you had these negotiations concerning the 12,000 tons of hydrated magnesium oxide, half

of which belonged to Mineral and half of which belonged to Gulf, is that right, sir?

A. Right.

MR. SCHAEFFER: Negotiations with whom? With what?

Q. Now, who were those negotiations conducted with?

MR. LESSER: I would like for you to establish whether he was the only one that negotiated on behalf—

MR. SCHAEFFER: (Interrupting)— I OBJECT. What is the difference which deals—

A. (Interrupting)—Which negotiation? Are you talking about doing something with the mag. oxide, or the joint contract there, or what?

Q. Now, you had negotiations with Mr. E. B. King and with Mr. Don Grether?

A. Mr. King was the official negotiator.

Q. Right. In the first six months of 1973. For what purpose were those negotiations?

MR. SCHAEFFER: I OBJECT to that, Mr. Berel.

MR. LESSER: He wanted to make money. We all know he wanted to make money. Let's forget it.

Q. Those negotiations dealt with what subject matter, sir?

A. (Indicating Exhibit Mineral No. 1)—This.

Q. Looking at Defendant's Exhibit Mineral 1, are you familiar with paragraph labeled Roman Numeral Two?

A. Yes, sir.

Q. (Indicating Exhibit Mineral No. 1)—You are looking at that to refresh your memory, sir?

A. Yes. I am very familiar with the piece of paper.

Q. All right, fine. When Gulf set up the facilities and provided the labor for processing this hydrated magnesium oxide at Freeport, Texas at Gulf's expense, did they provide all of the labor?

A. Completely. We had no contract; none of our people were permitted on their property, and we had

nothing to do with their setting up the facilities.

MR. LESSER: Did you have the facility?

A. No, sir. Gulf had all of the facilities.

MR. SCHAEFFER: You are not allowed to ask that witness anything.

MR. LESSER: Oh, I'm sorry.

Q. Now, did Mineral have any facilities for drying, screening or calcining the hydrated magnesium oxide at Freeport, Texas?

A. None, sir.

Q. Now, under Roman Numeral Three of this document, the first sentence reads that M.R.D.C. will be responsible for setting up facilities at Harrisburg, N.C. for processing. Could you describe what the set up of facilities was?

A. The facilities at Harrisburg in no way was related to what was being done in Texas.

Q. What were the facilities?

A. There were none. There were no facilities. This clause was simply put in there as a balance in case Gulf's processing cost seemed to be exorbitant. Then, we could take material and convert it into magnesium chemicals, but we could not make and never entertained making magnesium oxide at North Carolina. We have never had the facilities capable of making magnesium oxide. We were thinking of making chemicals like magnesium nitrate. This is a solution, a clear water solution, as opposed to the white powder.

Q. So you are saying that you would be able to, if the need arose, in Harrisburg, North Carolina, if Gulf found it unprofitable to—

A. No, no, no. We had that in there simply as an alternate approach. In effect, if Gulf came along and said that it cost them $5,000.00 a ton to process, then we could say, all right, we would take so many tons and it would also cost us $5,000.00 to process. I had it done simply as a

leverage against their coming up with an exorbitant processing cost.

A. I see.

Q. But it was clearly intended that our processing would be for our own consumption and would in no way make a saleable or commercial magnesium oxide. It had nothing to do with magnesium oxide.

Q. Roman Numeral Five of the agreement reads that M.R.D.C. will be responsible for and in charge of the sales. Now, is that of the sales of the hydrated magnesium oxide?

A. This agreement was written, specifically, on going into magnesium oxide on a commercial basis. The standard M.G.O. of commerce—which Gulf could make with its equipment at Freeport. We would be, in effect, the sales agent.

Q. Is there anything in this document or anything in your negotiations in writing to indicate that Mineral was the sales agent?

MR. SCHAEFFER: It says so in the document.

MR. LESSER: It says so right there.

MR. BEREL: It says in Roman Numeral Five that M.R.D.C. will be responsible for and in charge of sales. It doesn't use the term sales agent, does it?

MR. LESSER: Will you read the rest of it, please? "Mineral will receive a five percent commission on all sales made by it."

Q. The exact language "sales agent" is not utilized, is it?

A. No, the—

MR. SCHAEFFER: (Interrupting)—The document speaks for itself.

A. But the commission is a normal sales agent's commission for this type of chemical.

Q. And when Mineral—

A. (Interrupting)—Five percent is standard throughout the industry for a person acting as a distributor or sales agent.

Q. And Mineral's role in being in charge of sales was on behalf of this joint venture for the mutual benefit of both parties, is that right?

A. Our sole intent was to move the magnesium oxide.

Q. But the role of Mineral was just as it says in the agreement, isn't that right? A joint venture for the mutual benefit of—

A. (Interrupting)—Well, you have the agreement. The language of it is, I think, self explanatory.

MR. LESSER: The contract speaks for itself.

Q. Was a bank account set up in the names of the joint venture and some other names?

A. Yes, sir.

Q. Where is that bank account set up?

A. Freeport, Texas.

Q. What bank was that bank account maintained?

A. I think the Brazoport Bank of Commerce.

Q. The what?

A. I think the Brazoport Bank of Commerce. This could be ascertained.

Q. And what was the title of that account, if you know?

A. I don't recall. It was just a depositor to bring in the funds from this.

Q. Were any checks ever written against that account?

A. Yes, sir.

MR. SCHAEFFER: You have copies of those checks.

Q. Who were the signatories on those checks?

A. I believe Mr. Smith and either Mr. King or Mr. Grether, probably both.

Q. Mr. Smith is employed by whom, sir.

A. Mineral Research.

Q. By Mineral. And what capacity was he employed by Mineral?

A. He's general manager of Texas.

Q. When you say "Texas", you mean Freeport, Texas?

A. Yes, sir, in our Texas plant.

Q. And the other signatory you believe was Mr. King?

A. It was definitely someone from Gulf. It was either Mr. King or Mr. Grether. In my mind, I think either was authorized to sign.

Q. Did the checks emanating from that bank require the signatures of Mr. Smith as well as the signature of the representative of Gulf, or either one of Gulf or Mineral?

A. I think it required both signatures. Like he said, you have the checks.

Q. I believe you indicated earlier that all of the personnel of Gulf were at the facilities to do the processing of the hydrated magnesium oxide?

MR. LESSER:- I am going to OBJECT to that. I think that is a complete and absolute misstatement.

MR. SCHAEFFER:- May we hear the question read back?

MR. LESSER:- (To Mr. Berel)—Why don't you just rephrase it. I don't even know what you mean.

Q. Now, the processing of the hydrated magnesium oxide in Freeport, by whom was that conducted, sir?

A. By Gulf.

Q. And the processing consisted of drying, screening and something else, sir?

A. The entire operation. They would dig it up, transport it, put it into whatever mechanical things they needed to do and then put it into the calcining equipment and then screen it and work with it after that and then analyze it before and after; and then put it into rail cars. The only thing that we did was to send them information as to which people were purchasing.

Q. How many orders or invoices for the ultimate destination did you receive?

Q. I have got that in the files someplace.

MR. LESSER:- No, that record is in the hands of Hartford.

Q. Did you have anyone on Mineral's payroll at the facilities while this was going on?

A. No, sir. Absolutely no one.

Q. No office personnel?

A. No, sir.

Q. No labor at all?

A. No, sir.

Q. No administration or administrator or anything of that nature?

A. No.

Q. Bookkeeper?

A. We had nothing to do with it. As a matter of fact, it's an area where Gulf had considerable expertise, and we had none.

MR. BEREL:- I OBJECT to the last part of the answer as not being responsive.

MR. SCHAEFFER:- I think that it is fair to say that that was a continuation of the previous answer.

MR. BEREL:- Thank you Judge Schaeffer.

Q. Now, at the end of this certain period, were any profits distributed?

A. You use the word "profits", and there were no profits from the operation as such. There were receipts that were distributed.

Q. There were no---

A. (Interrupting)—There were receipts; there was money that had come in off the sale of the magnesium oxide. It was distributed to pay for expenses.

Q. (Referring to document)—We are looking at Roman Numeral Six which starts with the words, "Profits will be distributed."

A. That's correct.

Q. Are you saying that what is contained in that language never was a fact? That there were no profits, sir?

A. There was cash receipts which were distributed, but there were no profits. You see, that word "profits" does not

refer to net, gross, what have you, but there were no profits in the normal business sense of the word.

Q. Were the sales facilities of Mineral utilized for the selling of this particular product?

A. Yes, un huh.

Q. Will you tell us how the sales facilities were utilized of Mineral?

A. Well, we had sales people who made calls on accounts that were potentially interested in buying a commercial grade of magnesium oxide. When these people were interested, then we informed Gulf of such, and Gulf sent them samples. These people looked at the samples and decided that they liked the product or they didn't. Then they would place orders, and we would relay the orders to Gulf.

Q. What purpose, generally, is the commercial grade of magnesium oxide used commercially?

A. It's used for a wide variety of uses. There's no one specific use. It's used in chemical applications, to manufacture magnesium chemicals; and agriculture, it's used by both fertilizer and feed people. You never really have any clear idea exactly where it goes because all of the companies that are involved in the agricultural purchase and resale of magnesium oxide are generally selling to both fertilizer and feed applications.

MR. LESSER:- Why don't you ask him that, when he sells the product, if he knows what purpose it's going to be put to?

Q. Now, when the product was sold by Mineral on behalf of this joint venture, was it known to the sales person the eventual use of the product?

MR. SCHAEFFER:- Which sales person? Do you mean the sales person for Mineral?

MR. BEREL:- Well, the sales person for Mineral was acting on behalf of the joint venture.

A. The sales person would have some idea, but the

people we were selling to would never be specific because they were trying to shield where it was going so that we wouldn't sell to their customer.

MR. LESSER:- In other words, you wouldn't even know the potential use or user?

A. We would not know the ultimate user; in fact, all of the material was sold on the basis of pre-shipment samples whereby we submitted materials that Gulf had processed, and the customer would take a look at this. How far down the line the customer passed this, we had no control. Once a customer had approved a pre-shipment sample, then we would inform Gulf that the customer had approved and wanted so much tonage, and Gulf would then ship it.

Q. Mr. Drinkard, at the time that the sales people at Mineral began to sell the product that we were just talking about and described, did Mineral have on its staff a certain number of sales personnel, salesmen, saleswomen?

A. Yes, but I don't recall---

Q. (Interrupting)—Did you have salesmen employed by Mineral?

A. Yes.

Q. And were these salesmen on the payroll of Mineral at that time?

A. Yes.

Q. And, without regard to their compensation, as such, were they generally on a salary plus a percentage or how did they--

A. (Interrupting)—On salary.

Q. Straight salary?

A. Yes, sir.

Q. Now, when they began to sell the product that's in here (indicating document) that is the subject matter of this document, were they utilizing certain invoices or order forms?

A. Most of the orders came in verbally.

Q. Well, where did the orders come into?

A. Into this office.

Q. Right here where we are now?

A. Well, we have moved since. Actually, the Charlotte Office.

Q. Your Charlotte Office?

A. Yes.

Q. And they would come in either in writing from one of your sales people, where ever they were, or would---

A. (Interrupting)—Mostly, they were called in by the customer.

Q. And when they were called in by a customer, was an entry made at Mineral's records as to this being an order that was pursuant to this joint venture?

A. It was not worded as that, no, sir. It was simply an order saying so much poundage to such an address for such a customer. This was written up on a form that was called into Gulf and sent to Gulf.

Q. You say, "on a form"?

A. Yes, sir. The order was called into Gulf with specific information: shipping, date, poundage or tonage, and then a written copy of the form was sent to Gulf. The form just said that---

Q. (Interrupting)—This written copy that was sent to Gulf, was that on the same stationary or order form that Mineral had always had up to that point or a different form?

A. It's just a form that we established.

Q. When you say, "we established", do you mean Mineral and Gulf established it?

A. No, Mineral established it.

Q. And Mineral established it for what purpose?

A. Just to send orders to Gulf, but it's not--

Q. To segregate it so that it could be identified as ---

A. (Interrupting)—The only requirement is that it had the information so that it was shipped to the correct people. I'm not even sure the order forms had any title or anything on them.

Q. Was there some notation indicated somewhere on the order form, either by sign or symbol or word, so that the proper credits or debits could be allocated, with reference to this agreement entered into between Gulf and Mineral?

MR. LESSER:- I am going to OBJECT to that. He has testified that they were the sales agents; that they didn't have any of this product themselves---

MR. BEREL:- (Interrupting) I understand that.

MR. LESSER:- (Continuing)---and that they were only going to Gulf to get it. It would be clear on its face that he couldn't go anyplace else; nothing else could happen, and he's supposed to get his five percent.

A. That's all we got was the five percent. We never received anything else on it, just the sales commission.

MR. BEREL:- All I wanted to find out from this witness was how his company, how Minteral, differentiated this as opposed to any other---

MR. SCHAEFFER:- Why don't you ask him if he sold any other magnesium oxide? That solves the problem.

Q. Did you sell any other magnesium oxide?

MR. SCHAEFFER:- Other than the Gulf stuff?

A. No, no. You are trying to establish the forms as being different, but they are no different from the forms we would do for anyone. It was just set up so that they would convey the required shipping information for this specific account.

Q. Now, what about the price of the merchandise or the sale itself? Would you say—Who would determine the price for purpsoses of a sale?

A. The market place, essentially.

Q. How is that determined by the market place?

A. Well, you go through these things with the customers who say that they can obtain it for $100.00 a ton, and we either had to meet $100.00 a ton or not sell it.

Q. Well, would you or any representative of Mineral or

your salesmen confer at any time with Gulf to ascertain whether or not the correct quote was given for this sale or whether they had come in too low or too high or the right price?

A. I suppose some of this was done, but everyone had a pretty good understanding as to what the market price was.

Q. Well, how did they arrive at that good understanding?

A. Well, there had been lots of communications going on before. Like Basic Incorporated tried to buy those files down there. You know, you asked about that earlier. Basic Incorporated was interested, and they asked and were told that it could be sold at essentially the same price as our customers could be sold.

Q. Well, at some point sir—what I'm trying to ascertain is that---

A. (Interrupting)—I understand your side of it. What I am trying to say is that it is pretty close to being a commodity item. There is not that much price spread in it. It's not like selling something that you have a real negotiator price on that you can get that involved in. It's almost like selling salt; the prices are fairly well established, and they have only very narrow fluctuations.

Q. All right, the narrow fluctuations, was there an understanding between Gulf and Mineral with reference to what those narrow fluctuations were for purposes of sale?

A. No, afraid not.

Q. Were the sales people at Mineral instructed as to what the minimal price would be for purposes of selling this product?

A. No, in this case as I recollect, it never came up. All the prices were about $100.00 a ton. All the information back from the market place was what we had anticipated.

Q. The price remained at that average price of $100.00 a ton?

A. I would have to look it up, but say around $110.00 to $95.00. So, it averaged around $100.00 a ton?

MR. LESSER:- I think he said from ninty-five to a hundred and ten.

MR. BEREL:- That's what I said. From ninty-five to a hundred and ten.

Q. Do you know or can you ascertain from your records whether at any time the price—an order was taken at a certain price, and was any check made with Gulf as to whether or not the sale could be made at the price given?

A. I am positive there was not. It sounds very unusual, I know, but I don't recall any dissension or discussion with Gulf on it—on pricing. All of us knew, roughly, what the marketplace was obtaining. It was pretty much a commodity item. It's very unusual. In other fields that I have been in, you would normally expect a lot of price discussion.

Q. When you say, "all of us knew . . .", you mean Gulf knew and Mineral knew as to what the general price would bring, is that right, Mr. Drinkard?

MR. SCHAEFFER:- How would he know what Gulf knew?

MR. BEREL:- That's what I wanted to get into.

Q. Were there any discussions as to---

(Interrupting)—I am just saying that there was no discussion, no dissension on it.

Q. I know there was no dissension, but was there any prior discussion as to what price would be in the area of sales?

A. I would say that Gulf knew, as we did, independently, as to what the pricing would be.

Q. When you discussed your negotiations for six months of 1973 with Mr. King and the other individual named, did you, at any time, discuss with either of them or both what the price would be for the purposes of sales by and of Mineral's people?

A. I am positive it would have come up at some time, but there was no real negotiation as to what the price to sell it at.

Q. Looking at paragraph labeled Roman Numeral Five, the sentence, to refresh your memory, reads: "M.R.D.C. will provide Gulf with copies of sales invoices, and will obtain approval from Gulf in advance on general pricing levels and delivery commitments for various grades of material." To your knowledge, was that done in advance—the approval from Gulf on the general pricing levels and the delivery commitments?

A. By tacit agreement, yes.

Q. By what agreement, sir?

A. Tacit, I'm not sure I am using the right word, but there was just not a big discussion on price. It was just very unusual.

Q. You mean that as the---

A. (Interrupting)—In other words, that clause was in there and Gulf could have objected or . . . (voice trails off).

Q. You mean that as it turned out the sales invoices that were given did not meet with any objection in terms of price by Gulf, is that right?

A. Right.

Q. But this sentence in the agreement, did Gulf negotiate that with you, personally, as to this being included within the terms of the agreement?

A. This, I do not recall. I'm not trying to be that vague, but it's a real unusual situation in that there was not discussion on prices.

Q. You signed this agreement on September 10, 1974 which was fourteen months—a year and two months—after it was signed by a representative from Gulf. Between July 16th, 1973—the signature that's indicated here from Mr. King and Mr. Henning of Gulf—and September 10, 1974, had Mineral and Gulf been acting on this agreement.

MR. SCHAEFFER: I don't understand that question.

Q. Was the joint venture being conducted as such between that period of time?

A. They were processing magnesium oxide, yes.

Q. And was it pursuant to what was already on this document—written on this document?

A. Yes, un huh.

Q. And had any sale or sales going on by Mineral---

A. (Interrupting)—Which day are we talking about now?

Q. I am talking about between July 16, 1973 and September 10, 1974 when, it would appear, you signed this agreement.

A. I'm not certain of the exact date that sales started. It seems like they started mostly after that.

Q. After which date?

A. After our signature.

MR. SCHAEFFER:- Let the record show that sample lots were sent out in March of 1974.

A. Sample lots were sent out prior to this. I think that almost all of the production and sales was October, November and December of '74.

Q. Production and sales were in what months, sir?

A. October, November and December of '74. But, there was material samples processed by Gulf which were sent out prior to those dates. I do not think that actual sales were made until approximately after our signature.

Q. Do you know whether or not between July, '73 and September, '74 there was enough production to result in a sale if an order had been taken?

A. I don't think there was enough to result in a sale.

Q. Are you saying, sir, that it took that long for the processing of this material there until the sales could be set up?

A. It took Gulf a considerable amount of time to set up their equipment to be completely ready to process this material.

Q. Approximately, how much time would that be, do you know?

A. Four to six months.

Q. Did you or any representative of Mineral go to Freeport to look at the production facilities to see whether or not they were actually set up for the purposes stated in this agreement?

A. No. No one at Mineral Research ever saw the production facilities.

Q. Did anyone at Mineral ever make inquiry as to when the production facilities would actually be completely in operation so that sales could be effected and consumated?

A. Yes.

Q. And when was that, sir?

A. I have no idea, sir, but I am positive we asked them when they were going to have some production.

Q. Who is in charge of sales at Mineral?

A. The ultimate responsibility rests with me.

Q. Did you make an inquiry as to when production would be completely set up so that the sales operation could be in a ---

A. (Interrupting)—I would say yes, but I do not have a specific date or instance in mind.

Q. And who did you make inquiry of at Gulf?

A. Mr. King.

Q. Did Mr. King ever indicate to you that production was being delayed for any reason?

MR. LESSER:- Why do we want to get into this?

Q. Mr. Drinkard, what I am really trying to find out from you is whether or not you ever made an inquiry concerning the production facilities and whether or not there any problem in the delay of the production being set up?

MR. LESSER:- Off the record.

DISCUSSION OFF THE RECORD

A. I, of course, was interested, and I asked Mr. King when he would be in production. In no other way did I have anything to do with production. None of our people had ever seen the production facility. We gave no advice to them about how it should be operated. We had no expertise in this field. We had no communication other than when would material be available for shipment and when would they be in production.

Q. But Mineral's expertise was in the sales field, is that it, sir?

A. Yes, sir.

Q. And the merchandise that was utilized for the joint venture was the merchandise that belonged to Mineral and the merchandise that belonged to Gulf?

A. Yes, sir.

MR. LESSER:- When you say "merchandise", do you mean hydrated magnesium oxide?

MR. BEREL:- I mean 12,000 tons of hydrated magnesium.

MR. LESSER:- I think he said that there was more than 12,000 tons.

MR. SCHAEFFER:- Approximately 12,000 tons.

A. You have got mountains of it laying on the ground, and it's very possible---

MR. LESSER:- It's 12,000 that they knew about and that they bought—and more that they owned.

A. That's correct. That's correct.

Q. Now, when the merchandise was sold,---

MR. SCHAEFFER:- You mean the hydrated magnesium oxide? It was never sold. You mean it was sold in the beginning? Are you talking about the beginning, now?

MR. BEREL:- I am talking about when they first took orders for sales.

MR. SCHAEFFER:- Well, that's not hydrated magnesium oxide.

MR. BEREL: That's magnesium oxide.

Q. The merchandise was shipped from Freeport, is that correct?

A. That's correct.

Q. And it was bagged in Freeport?

A. It was never bagged; it was all shipped in bulk.

Q. It was shipped in bulk?

A. (Nods head affirmatively).

Q. Are you saying, sir, that it never had an identifiable label on the bulk itself, so that it was packaged in some way?

A. It was shipped in accordance with standard commercial practice.

Q. And what is that?

A. Put it in a bulk box car and have a bill of lading specifying what the material is. There is no label ever applied to magnesium oxide. It's not a regulated commodity.

Q. It's not a regulated commodity?

A. In the sense that it would fall under the Federal Economic Poisons Act.

Q. So, it didn't contain a package that had a brand name or anything of that type?

A. No.

DISCUSSION OFF THE RECORD

Q. Mr. Drinkard, the magnesium oxide that was sold prior to—Did you say, by the way, that no sales were ever effectuated, or that there were sales?

A. There were a number of sales that occured, substantially, in the last quarter of '74.

Q. And those sales were consumated by shipments and so on?

A. Yes, sir. They were all bulk shipments.

Q. Now, prior to this agreement and prior to these sales, had Mineral ever been in the business of selling this particular product before?

A. No, sir.

Q. So, the first time that these sales were ever made was in connection with the negotiations and the agreement that was entered into between Mineral and Gulf whoch is Hartford's Exhibit Mineral No. 1? Is that right?

A. Yes

Q. Did Mineral, from the years 1973 through 1975, have its own manufacturing facilities for any products?

A. Yes. We covered that earlier.

Q. Was it magnesium oxide or hydrated magnesium oxide?

A. No, sir. Neither.

Q. So that the only sales that were made were made in connection with this contract that we have marked as Hartford's Exhibit Mineral No. 1?

A. That is correct.

MR. SCHAEFFER:- They were the only sales in magnesium oxide.

MR. BEREL:- of magnesium oxide.

Q. Are you aware of a claim by a company known as Grismer Farms, Inc?

A. Yes,sir.

Q. And did your company receive notice of such a claim at some point?

A. Yes.

Q. When, to the best of your recollection, did Mineral receive notice of such a claim?

A. At the same time the other companies did.

Q. By "the other companies," do you mean Gulf or Associated?

A. Let's get off the record.

DISCUSSION OFF THE RECORD

MR. SCHAEFFER:- On Mr. Berel's behalf, I am asking Mr. Drinkard when, for the first time, does he recall having been informed by a third person that there was a claim being made against Mineral Research & Develop-

ment Corporation, among others, for loss of cattle by reason of taking in of molybdenum contaminated magnesium oxide?

A. Stop the record again.

DISCUSSION OFF THE RECORD

A. This would be in early July, 1975.

Q. Is Mineral a party to a lawsuit in South Dakota brought by Grismer Farms, Inc.?

A. Yes.

Q. To your knowledge, is there a policy of insurance covering the claimed loss in South Dakota?

A. A policy owned by Research & Development Corporation?

Q. Yes, sir.

A. Yes, sir.

Q. Do you have that policy here before you?

MR. SCHAEFFER:- I think, for the record, we ought to say that there are three policies in question, one of which there is apparently a dispute in the comprehensive general liability policy issued by I.N.A. There is another policy issued by I.N.A. in the nature of an umbrella insurance policy in which Mr. Drinkard informed all of us here earlier today that I.N.A. has orally indicated they will now accept coverage.

MR. BEREL:- Is that correct, Mr. Drinkard?

A. Yes, sir, that is correct.

MR. SCHAEFFER:- There is a Lumbermans policy which expands the limits of all other policies which is also in the packet, but I don't think, in fairness to Mr. Drinkard in the absence of his counsel, those policies ought to be marked.

MR. BEREL:- Let the record indicate that I have before me some photostats of what appears to be insurance policies issued by the insurance companies North America and Kemper; and that there are numbers listed on these policies as Exhibits, Exhibit 4 and Exhibit 7. Do you know how those numbers got on there, Mr. Drinkard?

A. Yes, sir. Those are the exhibits that are being sent to our counsel in South Dakota.

Q. For use in the South Dakota lawsuit?

A. Yes, sir

MR. SCHAEFFER:- We don't know whether it's going to be privileged; we don't know if it is going to be re-certed or not. I don't know what he is going to do. The appropriate thing to do would be to ask Mr. Byrum, at whatever time, if he has any objection to revealing that to you.

Q. And Mr. Byrum is the general counsel for Mineral?

A. Yes, Mineral Research.

Q. What is Mr. Byrum's address?

A. It's in the Johnston Building. I could get that for you. It's the firm of Byrum, Byrum and Burris.

MR. LESSER:- In what city?

A. Charlotte, North Carolina.

MR. BEREL:- (To Mr. Schaeffer)—Do you want to question him?

MR. SCHAEFFER:- I have some.

MR. BEREL:- Go ahead.

CROSS EXAMINATION:- (By Mr. Schaeffer)

Q. Did there come a time when Associated purchased equipment in the Freeport area which was situated on the site which was eventually purchased, or had been previously purchased by Mineral?

A. Yes.

Q. What was the nature of that equipment?

MR. BEREL:- Could we have a time period of when that was purchased?

MR. SCHAEFFER:- We know when it was purchased.

MR. BEREL:- You said, "Did there come a time . . ."

A. This was calcining equipment suitable for treatment, such as magnesium oxide. It can be used for many other purposes, of course.

Q. What do you mean by calcining equipment?

A. Equipment for temperature processing of chemical solids.

Q. Was that facility situated on the site in Freeport, Texas prior to the acquisition of the land itself by Mineral?

A. Yes, that is correct.

Q. And, thereafter, Associated leased from Mineral did it not, the land on which the facility was situated?

A. On which the equipment was situated, yes.

Q. Was that facility readily movable?

A. No, sir. It was not.

Q. I assume it was a structure that was anchored to the ground?

A. The structure in question—the main structures are composed of firebrick which are laid in by hand. If they are moved, the firebrick collapses and the majority of the value of the structures are gone.

Q. Now, with respect to the products being produced by Mineral, starting in 1974 at Freeport, Texas, would you tell me, essentially, what technical processes were undertaken at that site?

A. Essentially, purification of liquids. All of our work is based around liquid—with some precipitation for zinc carbonate, but none of our work involves any temperature processing such as calcining operations.

Q. You did not have the capacity there to heat to extreme temperatures any materials, is that right?

A. We can heat no materials, really, above the boiling point of water.

Q. And I take it that when you refer to "calcining," that that is a process requiring substantial heat?

A. Yes. Far above anything that we have ever had in our capabilities at either location.

Q. I take it also that Associated, or Gulf, at the Freeport location, by using the facility that it had acquired, could heat to substantial temperatures materials in its over.

or whatever you want to call it?

A. Roasters. Yes. Gulf can heat to the temperatures required in all of their technology and expertise at both the Texas city location and this location. There is a separate location, but I forget where. All are based around high temperature processing.

Q. In connection with the respective expertises of the two companies, Mineral and Associated, would you comment as to which, or both, has expertise in the calcining of materials such as magnesium oxide?

A. Gulf has all the expertise in that. We have none.

Q. Now, with respect to the five percent commission which is described in the joint venture agreement and has been shown you here today as Defendant Hartford's Exhibit 1 for Mineral, was that five percent commission in addition to other sums which would be realized by Mineral from this joint venture?

A. Yes, it would be.

Q. In other words, you were not only sharing the profits, so to speak, as that word was meant in the joint venture, but you were also receiving a commission?

A. Correct.

Q. Can you tell us whether or not a five percent commission is standared in the chemical industry?

MR. BEREL:- OBJECTION as to the form of the question.

Q. Is there a customary commission charged by sales agents in the chemical industry in the United States?

A. Yes.

Q. What is that commission?

A. Five percent.

Q. Were you aware of that at the time that you entered into that joint venture with Gulf?

A. Yes.

MR. BEREL:- Aware of what, Mr. Schaeffer?

Q. Were you aware of that being the customary commission?

A. Yes.

Q. As between Associated, or Gulf, on one hand, and Mineral Research & Development Corporation on the other—in connection with the performance of the joint venture agreement—who was responsible for the collections and billings from accounts?

A. We were.

Q. That's Mineral Research & Development Corporation?

A. Yes.

Q. Did Associated or Gulf have anything to do with collections or billings?

A. None. This is also customary in this type chemical arrangement with the five percent.

Q. From time to time, did Mineral give instructions to Gulf as to the method by which the calcined magnesium oxide would be shipped?

A. As to the shipping instructions on it?

Q. Yes.

A. Yes, sir.

Q. What were those instructions?

A. Simply a certain weight to a certain location, and the customer might express a preferred screen size—like fine or coarse. Something of this nature.

Q. Do you know by what means the magnesium oxide was transported from Freeport, Texas?

A. Bulk hopper cars.

Q. And who loaded the cars?

A. Gulf.

Q. Are you aware of the description used on the bills of lading in describing the magnesium oxide which was so shipped? Yes or no?

A. Yes, but I am a little bit hazy on it. It's been some time.

MR. BEREL: OBJECTION as to form.

Q. Are you aware of the fact that it was listed as agricultural materials?

A. Yes.

Q. No further questions

MR. LESSER:- I have no questions.

WILLIAM DRINKARD

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 21 day of July 1977 deponent served the within Appendix upon

Berel, Navarra & Mullen, P.C. and
Paskus, Gordon & Hyman, Esqs.

Berel, N
19 East
New York

attorney(s) for

Defendant-Appellee and
Plaintiff-Appellee-Appellant

in this action, at

Paskus,
733 Thi
New Yor

19 East 9th St., NYC and
733 Third Avenue, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 1 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 21 day
of July , 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978